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AMERICAN BAR ASSOCIATION

JOVRNAL

DECEMBER, 1933

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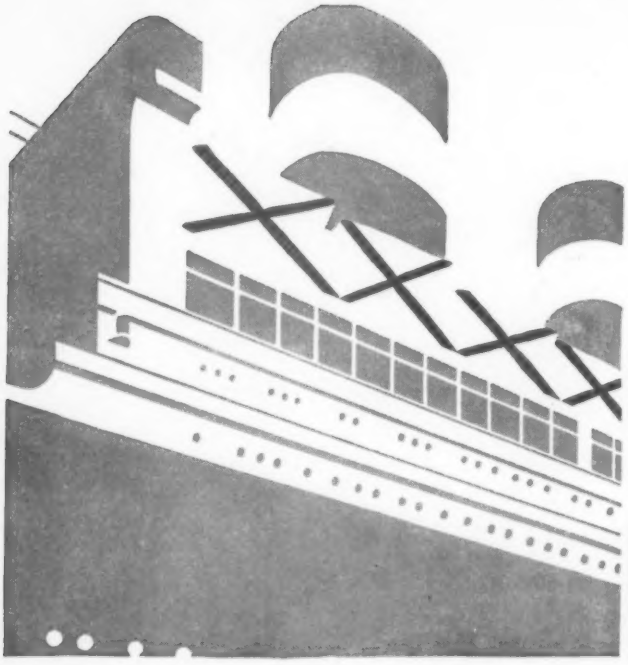

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AMERICAN BAR ASSOCIATION
JOVRNAL

VOL. XIX DECEMBER, 1933 NO. 12

The Restatement of Agency—Another "Indispensable Tool" of the Profession

THE American Law Institute's publication of the various Restatements of the Common Law is now being carried out according to schedule. Last year the Restatement of Contracts was given to the public and enjoyed an unprecedented sale. Now the Restatement of Agency is issued, in two beautifully printed volumes uniform with those on Contracts, and there appears no reason to doubt that it will receive a like favorable reception from bench and bar.

Those who have followed the work of the American Law Institute will doubtless recall that the Restatement of Agency was begun in the fall of 1923. Floyd R. Mechem, professor of law at the University of Chicago and the outstanding figure in this field at the time, was selected as Reporter for the subject and given a capable staff of advisers. "It is a satisfaction to record," says the introduction to the volumes just issued, "that Mr. Mechem lived long enough to see the completion of three tentative drafts dealing with the characteristics of Agency, the creation of the relationship, the creation and interpretation of authority and apparent authority, ratification, and termination, matters herein included in the first five chapters."

Mr. Warren A. Seavey, professor of law at the Harvard Law School, who had been Mr. Mechem's principal adviser from the first, was chosen as Reporter to fill the vacancy caused by the latter's untimely death. Under his leadership, we are told, "the tentative drafts of the remaining parts of the Subject, herein included in Chapters 6 to 14, were completed and published, as well as the revision of the entire Subject." The work was carried on in accordance with the familiar technique developed by the Institute. "The Reporter has been primarily responsible to the Council for the presentation to his advisers of preliminary drafts of the different Chapters, and, subject to amendments adopted by the Council, for the preparation and presentation to the annual meetings of the Institute of the tentative drafts. Nevertheless, the Restatement is the result of group work. The tentative drafts were developed from the consideration at numerous conferences between the Reporter and his advisers of a succession of preliminary drafts and redrafts and a consideration by the Council of the final preliminary drafts submitted by the Reporter and his advisers.

"The tentative drafts were not only submitted to the annual meeting of the Institute for criticism and suggestion but also to a conference of the representatives of the cooperating committees of State Bar Associations. Furthermore, these tentative drafts, except that relating to the last topic in the final Chapter, have been widely used by the bench and bar during the progress of the work, and the Institute therefore has had the benefit of criticisms and suggestions, the result of such use."

The proposed final draft was approved by the Council of the Institute and submitted to the annual meeting of that body on May 4. It was there considered and approved and publication of the volumes as the Institute's Restatement of Agency was authorized. Work on the State Annotations for the subject is progressing and in several States these Annotations will be ready within a short time. The lawyer is thus offered, to use the words of the late James C. Carter in outlining a somewhat similar plan, another "indispensable tool of his profession."

Unauthorized Practice Committee Meets

THE Committee of the American Bar Association on Unauthorized Practice of the Law met in Chicago on November 18th and 19th. Final approval was there given to a small pamphlet under the title of "Notes on Unauthorized Practice," containing, in addition to a short statement, a brief bibliography and digest of cases. This will be sent out by the first of December to Bar Associations over the country and can be had on request to the headquarters of the American Bar Association. The committee also discussed the part which unauthorized practice should play in the coordination program and laid out a plan of further activities.

Library on American Citizenship Presented to Bar Organization

A UNIQUE and important gift was made to the New York County Lawyers' Association by the Aline Brothier Morris Fund of New York City on the evening of Oct. 19. It was a library on American Citizenship, and the presentation was made by Mr. Robert C. Morris, who is a vice-president of the Association. The rare gift was accepted on behalf of that organization by Mr. Nathaniel Phillips, chairman of its committee on American Citizenship. Hon. James M. Beck, chairman of the American Bar Association's committee on the same subject was present and delivered an address.

Speakers on this occasion expressed the hope that many other bar associations would in time find ways of acquiring this powerful and inspiring aid to the propagation of the principles of good citizenship. In concluding his address Mr. Morris said: "I venture to suggest to our committee on American Citizenship that it communicate with other bar associations throughout the United States for the purpose of offering them the suggestion that a specialized library on American Citizenship would be a very helpful addition to their activities toward elevating the standard of citizenship, and that they make an effort to interest their respective members in creating such a library and using it effectively." In accepting the gift for the Association, Mr. Phillips stated that it was the intention of the Fund and of his committee to send to the presidents of all the bar associations in the United States a copy of the booklet on "American Citizenship," which had led to the creation of the library, and a detailed description of its establishment, together with an offer to furnish a list of the books and to cooperate with them in every possible way.

Mr. Morris Announces Presentation of Library

In announcing the presentation of the library, according to the account in the New York Law Journal of Oct. 20, Mr. Morris said, in part:

"Lawyers, because of their education, training and experience, are undoubtedly the best missionaries to spread the gospel of good citizenship. With our own great membership of over 6,000, most of them of the younger generation, the opportunity is at hand for volunteers, under the direction of our committee on American Citizenship, to start an extensive movement for better education in the privileges and duties of citizens, which seems to be much needed at all times. The Bar, more than ever, is appealing to public opinion, and wherever it can assume a public duty its position is strengthened both socially and in government. A strong effort to bring about a deeper appreciation of American citizenship is one of the finest ways in which its high purpose can be made manifest.

"Heretofore, helpful books on this subject could only be found here and there; now we have a unified library at the service of our members. It is the hope of the Fund that this library will be largely used, particularly by the younger practitioners, for it is to the younger men that we must look to lend their aid in carrying on the work of maintaining the basic principles of our scheme of government, and the most practical way to accomplish this is for them to preach the essentials of good citizenship.

"The inspiration for the establishment of this library came from a little book entitled 'American Citizenship,' published by the Fund, which was created as a memorial to Aline Brothier Morris, a naturalized citizen, to perpetuate her patriotic work in support of the principles of our government. This book was brought to the attention of our committee by an eminent judge who felt its appeal so strongly that he thought the committee should take an interest in circulating it. Accordingly, the committee examined it and aided in its distribution to members of the Bar and educators.

"This was followed by the request of the committee to the Fund to establish a library on American Citizenship. The committee submitted the list of books desired, after consultation with the library committee of the association, and this library has been created in accordance with the wishes of these two committees."

Mr. Phillips' Address of Acceptance

Mr. Phillips' address of acceptance gives further interesting details of the genesis of this fine gift and of the personality whose sentiments and ideas the directors of the Fund had expressed so well. He said in part:

"Seeds sown in kindliness live on long after the hand of the planter is forever stayed. A gentle lady, a newcomer from France, loves her chosen country with surpassing consecration. She becomes an American citizen and seeks to instill in her fellow-new-Americans, and in those not yet nationalized, an abiding faith in American principles and an earnest devotion to its ideals. Mrs. Morris, had she lived, would have returned, many times over, to America, the welcome and happiness she won in the land of her adoption. To keep alive her spirit the Aline Brothier Morris Fund was founded. It is carrying on her work of spreading the gospel of good citizenship.

"For years the committee on American Citizenship of the New York County Lawyers' Association has been endeavoring to do its part among the lawyers of this county and, through them, to the community generally, in inculcating a love for America, a knowledge of its Constitution and an earnest effort to spread the ideal of our country as the land not of opportunities only, but of obligations reciprocal to the matchless advantages which America offers to its people. As part of the pro-

gram of our committee we dreamed of the establishment in this home of law of a citizenship library, a specialized collection of books that treat of our system of government, that tell of the development of the foundation principles of our experiment as a representative democracy, that trace the life-story of the master-craftsmen who built our Constitution and of the great judges and law writers who, by their deathless pens, gave it rounded form and lasting strength.

"I cannot refrain from appreciative mention of Miss Emilie Bullowa, my predecessor as chairman of this committee, for it was in her term of inspiring leadership that the idea of the library was first planned. Here, too, I am delighted at the opportunity of thanking Mr. A. Stephen Aaronstamm, a member of our committee, who so capably toiled through the wide range of books appropriate to the aims of the library that he might cull from them all the hundreds that made up the finally suggested list of books for the library.

"But dreams and lists of books had never proved sufficient, and I fear the Citizenship Library would still have been no more corporeal than the stuff which dreams are made of were it not for the Aline Brothier Morris Fund and a little booklet called 'American Citizenship' which it sent forth to the judiciary and to others eminent in the civic life of our country. The booklet seemed so genuinely to express the aims of our committee that quite a number of mutual friends of Mr. Morris and myself wrote to us both that we should get acquainted —for the earlier advancement of our common citizenship aims.

"Mr. Morris has told you of the eminent judge who brought the booklet to the attention of our committee. The Aline Brothier Morris Fund and Mr. Morris became valiant champions of our work, understood the implications of our Citizenship Library project, and listened with sympathetic goodwill to our hopes for active aid. The plan of creating such a library met their warmest support. The Board of Directors of the New York County Lawyers' Association, its library committee, the Association's librarian, all co-operated in a fine spirit of encouragement which helped make possible the founding of the library and tonight's notable ceremony."

Mr. Beck Speaks on "Citizenship"

Mr. Beck's address dealt with "Citizenship" and he began with the statement that since the beginning of the Republic there has never been a time when it was more important for lawyers to consider carefully the elements of good citizenship than at present, when our institutions, and indeed all human institutions, seem to be in process of dissolution. Following are some extracts from this address which lack of space unfortunately prevents us from printing in full:

"I take it that the first duty of a good citizen is to know the history of his country, for how can he intelligently determine any current problems except from the background of past experience? I appreciate that the present philosophy of the day is to disregard the collective wisdom of past ages. We are living in a bumptious, self-assertive era when we have reversed all previous methods of thinking by holding that every truth of past experience is presumptively false and every new idea is presumptively true, whereas the only safe rule of society is the very reverse. I recognize that an intelligent man today knows more than any intelligent man of past ages, even though he were Francis Bacon himself, could know, but I decline to believe that any man today, however intelligent, knows more than the collective wisdom of the past, for that is the result of the thoughts and experience of countless generations. It is not merely a question of weighing the knowledge of one century against another, for there is something more than knowledge involved in the problem. There is the question of moral obligation. Edmund Burke said that society was a noble compact between the dead, the living and the unborn, and the good citizen should always keep in mind that he owes a debt to the past to pass on the torch of liberty to the unborn. No man who lives today and who is insensible of this obligation to the past and to the future can truly be a good citizen, even though he does vote once a year.

"This obligation imposes upon the living generation the duty of maintaining the Constitution of the United States in its full integrity until and unless it is amended as prescribed in that instrument. To many of the present generation, it seems foolish to plead the sanctity of the Constitution. To them it is an outworn and antiquated document, but to the thoughtful American the Constitution is the best single embodiment of the wisdom of the past and the best assurance of the perpetuity of the Union. In recent years it has been shown to be easy to destroy this instrument, but those who destroy it will one day realize that it is not so easy to rebuild. Washington warned the American people in his farewell address that the Constitution, unless they were vigilant, would be slowly undermined, and the man is blind who cannot see how far the process of undermining has proceeded. The fundamental philosophy of the Constitution was that security was preferable to efficiency. The founders of the Republic believed more in the great imponderable of liberty than in the pragmatic advantage of swift and easy action. The present generation of Americans prefer action to liberty.

"There are two classes of political thinkers among men: One you can call the moralists, and the other the pragmatists. The pragmatist judges everything from its practical results. As an old adage says: 'The proof of the pudding is in the eating.' The pragmatist says that the sole criterion of wisdom or folly or right or wrong, in any matter, is whether its immediate result is beneficent or injurious. If the result is bad the principle is bad. The moralist, on the other hand, gives little attention to the immediate consequences and belives that a question of fundamental principle is little affected by its practical results. The latter may work a present hardship, and yet the principle may be of preponderating importance.

"The founders of the Republic were moralists while the men of our time are pragmatists. In this respect the 'ethos' of the people has undergone a portentous change, and current controversies are apt to be determined in the spirit of pragmatism.

"Let me give you an illustration from our history as a nation. The stamp tax and the tax on tea caused the Revolution and led to our independence. If the people of that day had been pragmatists they

would have said that the exaction of the tax, which would have amounted to only a few millions of dollars, could be accepted when it insured us the support of the first navy of the world and the prestige of a great empire, of which we were than a part.

"But they were not pragmatists, but moralists. They felt that in these taxes a great principle was involved. They recognized that the power to tax was the power to destroy, and that if the colonies could be subjected to internal taxation by an act of Parliament and without the consent of the colonial legislatures they would be in a state of vassalage. The practical effects of the tax were as nothing to them in comparison with an important principle.

"Today we are living in a very practical age in which the spirit of pragmatism is a natural reflex of a mechanical age. This is shown, as I have indicated, in the fact that the American people attach far greater importance to efficiency in government than to security of their liberties. What they want are results, and they are disposed to condemn the American system of checks and balances because it does not make for efficiency, although it tends to prevent the undue concentration of power in any one man or any body of men. . .

"The Constitution of the United States was not conceived in a spirit of pragmatism. Possibly, above every other political document in recorded history, it sets up certain eternal ideals, and its mighty spirit is expressed in its noble preamble, when it included among its great objectives a purpose 'to establish justice.' Our fathers did not mean by this expression merely law, for the laws are but the means whereby fallible man approximates to justice. To the framers of the constitution justice was an eternal spirit, and its sanction was in the conscience of men. Its spirit can be summed up in the words of Micah, 'to do justly, to love mercy and to walk humbly with thy God.'"

American Legal History Society to Be Organized

ORGANIZATION of the "American Legal History Society" will take place at a luncheon meeting to be held in Chicago at the Hotel Stevens on Friday, Dec. 29 at 12:30 P. M. While the meeting will be held at the same time as the meeting of the Association of American Law Schools, a general invitation is extended to members of the American Bar Association, of the Association of American Law Schools, of the American Historical Association and the American Political Science Association to attend and participate.

The background of the movement to date is as follows: Several teachers in law schools of American Legal History have been interested in advancing the study of this subject. The matter has been discussed at round table meetings of the Association of American Law Schools and, due to suggestions from this group, a committee of the American Bar Association was appointed, of which Honorable Earle W. Evans was Chairman, Dean James Grafton Rogers, and Mr. Robert H. Jackson were members. Pursuant to vote of the Association of American Law Schools a committee was appointed by President Charles E. Clark consisting of Professor Joseph H. Beale of Harvard, Chairman, and Dean A. M. Dobie, University of Virginia, Julius Goebel, Columbia University, Myres S. McDougal, University of Illinois, F. S. Philbrick, University of Pennsylvania, J. H. Wigmore, Northwestern University, and Carl Wheaton, St. Louis University. An account of this movement up to this point in its development, written by Professor Carl Wheaton, entitled "A Movement to Stimulate the Writing and Study of the Legal History of the United States," appeared in the April, 1933, issue of the AMERICAN BAR ASSOCIATION JOURNAL.

Professor Beale's committee invited those interested to meet at Washington at the time of the annual meeting of the American Law Institute last spring and, as a result of that meeting, an organization committee of twenty-one was created, which at its meeting in New York on June 3, 1933, chose Mr. Charles E. Clark as Chairman and Professor Solon J. Buck of the Western Pennsylvania Historical Survey as Secretary. A subcommittee of this body has prepared a draft of proposed By-Laws for the new society, which will be acted on at the Chicago meeting.

Tickets for the luncheon at $1.25 may be obtained from the Secretary of the Association of American Law Schools, Rufus C. Harris of Tulane University, New Orleans, La., or, after December 27, at the Association's headquarters in the Hotel Stevens, Chicago.

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(Standing and Special Committees on page 681, Nov. issue. General Council and Officers of Sections, pages 619, 620 Oct. issue.)

AMERICAN BAR ASSOCIATION
INSTRUCTIONS FOR PARTICIPANTS IN ESSAY CONTEST

Conducted by

AMERICAN BAR ASSOCIATION

PURSUANT TO TERMS OF BEQUEST OF
JUDGE ERSKINE M. ROSS, DECEASED

Those eligible to participate:

Members of Association in good standing, exclusive of officers, members of Executive Committee, and employees of Association.

Subject to be discussed:

Administrative Agencies in Government and Effect Thereon of Constitutional Limitations.

Length of paper:

Not more than 5000 words.

Amount of prize to be awarded:

One Thousand Dollars ($1,000.00) in cash.

Time when papers must be submitted:

On or before March 1, 1934.

Person to whom essay and duplicate identifying number should be sent:

Olive G. Ricker, Executive Secretary,
American Bar Association,
1140 North Dearborn Street,
Chicago, Illinois.

Instructions for preparing and mailing essay:

1. Papers submitted must be typewritten on plain white paper, letter size, (8½ x 11), and be mailed without folding, in plain envelope furnished for the purpose.
2. Only the number assigned to contestant may be attached to the essay; any other identifying number, name or mark thereon will disqualify the entry.
3. Duplicate number, attached to card or sheet of paper, giving full name and address of contestant must be mailed in separate plain sealed envelope, also furnished to contestant, for purpose of identification after winning paper is selected.

For convenience of contestants there will be enclosed:

1. Duplicate numbers in sealed envelope.
2. Large addressed envelope for mailing essay.
3. Small addressed envelope for sending duplicate number with name and address of contestant.

Signed Articles

As one object of the American Bar Association Journal is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this Journal assume no responsibility for the opinions in signed articles, except to the extent of expressing the view by the fact of publication, that the subject treated is one which merits attention.

THE MOLD OF NATIONALISM ON LAW AND STATECRAFT

Significance of the Marked Resurgence of Nationalism in Leading Countries of the World —If New Trends Are Permanent, They Require a Reconstruction of Much Accepted Thought in the Fields of Law, Government, Economics, Social Organization and International Policy—Conclusions of Interest and Importance to Lawyers and Public Men*

By James Grafton Rogers
Dean of the Law School, University of Colorado

THESE are days of lamentation in many quarters. The valiants of liberalism cry aloud. The ambassadors of peace are weeping. For the civilized world has plunged right and left into a program called nationalism, and that program and its implications collide with a great school of ideas which many enlightened men have accepted as wise and workable for this, our modern world. We feel the centrifugal sensations of a turn in history and thought. The stable elements in several great nations are silenced and demoralized. The elements we have called liberal in the old sense are vocal but bewildered. Those who advocate the new trend have only begun to fumble at forecasting its wider consequences.

There are signs that the world in its old inarticulate way is just exposing the existence of deep currents in our social ocean which have already carried our ships out of the courses that most navigators recognized and plotted on their charts. Men have a notorious trick of rationalizing only after the event. If the new trends are permanent, they require a reconstruction of much accepted thought in the fields of law, government, economics, social organization and international policy. If they are temporary, and our ships are restored after a little to the old routes, the consequences of the deviation will remain to affect our voyage, and the revelation of hidden currents must occupy our minds. If we can for a moment shut off the lament and exaltation which seem to divide the voices in the crew, and try quietly to discover where the passengers and cargo are being carried during the excitement, it may be worth while. Our judgments may be wrong, but some effort at forecast is better than none.

The events now taking place seem to me of the deepest interest to lawyers and especially to lawyers in the two countries of British tradition in this continent. We hear nationalism discussed principally in its international consequences. Its bearing in that field is important and that field is of concern to every citizen of Canada and the United States. Unless I am mistaken, however, the extraordinary development in so many countries of high tariff walls, of campaigns for self-sufficiency, of disillusion over democracy and other striking movements are really only parts of a much larger pattern. The pattern appears now to be a rearrangement of our whole conception of what government should be and do and of what law should accomplish as the means of government. If the mold is what it seems to me, the new nationalism threatens most of the temples and shrines of the English common law. It threatens to upset the lawyer's life, revise his training, alter his daily work and leave his sacred places neglected or thrown down. If even a part of these statements is true, the lawyer is keenly concerned with the events of the hour in America and Europe.

The outlines of the nationalistic image are familiar to all whose eyes are open. Its simpler trends are visible in any village which displays the poster "Buy in Millville" and likes to think it has the best high school or the highest water tower in the valley. In a wider stage we notice the slogan "Buy British" and similar phrases in your country and mine, tariffs and embargoes to shelter our industries from foreign competition, the tendency to intensify our own culture and resist the invasion of art and ideas from abroad, the plea for sufficiency within national boundaries, the impulse to purity of race and language, and impediments to immigration. Now increasingly there is a rush to what may be called "enclosed economies." Through laws dealing with industry and finance we set up artificial regimes which govern capital and labor, control competition, and fix production and prices all within the confines of a political unit. We wall off foreign goods and influences that might interfere, invoking tariffs, embargoes and other ramparts. The result is to make each country a closed vessel for self-experiment. None of these policies is altogether new. Some seem the simplest patriotism. All are old companions of the impulses to self-justification, community pride and racial culture which we recognize and often cherish. When Paul said proudly "I am a citizen of no mean city," he was riding the same gait that carried the British John Bull and the Babbitt of the United States centuries later jogging down the lanes of history. The significance of the present hour is that a host of familiar social impulses seem to be united in an emphasis on national self-containment that contests the established philosophy of international trade, cooperation and culture. Little Ireland in its slogan, Sinn Fein, "Ourselves Alone," in its Keltic way, put the whole dose in a capsule of words before the greater peoples quite sensed how large it was. The larger nations reach now through economic purposes for a self-containment which Ireland grasped at with political aims.

The great British Commonwealth, in its sober course, has been temperate in its adoption of this

*Address delivered before the Canadian Bar Association at Ottawa on August 31.

program, but even it has built new fences and burned some ancient charters. Among the larger nations, Russia, Italy, Germany, Japan and now the United States have each in its own way launched upon part or all the program. The policies known as Bolshevism, Socialism, Fascism, and Industrial Planning all have in some degree or other stood for enclosed economies and a rigid regime of legal regimentation within political boundaries, self-sufficiency and cultural individuality. The movement began before the present depression. It seems merely to have been accentuated by recent emergencies. The seed was in the soil ready for a favorable season.

On examination, some interesting details emerge. They throw much light upon the real character of the vast process in which we are engaged. In the first place, the units of the new nationalism are not necessarily racial or even geographical, linguistic or economic. They are political. Germany for all its propaganda does not represent a pure race or culture. Soviet Russia is a museum of races, languages and outlooks. Italy, Japan and Ireland are reasonably homogeneous units, but the United Kingdom, Canada and the United States have much in common in race, institutions and language and are yet divided in the new process into different units. If the units of the new nationalism are essentially governmental, the suggestion rises that the movement itself may originate in the demands or opportunities of political organization. The thing smells of law, its aims, its possibilities.

Again the main impulse seems to come from economic motives. Race culture, military ends, and financial problems have all appeared here and there, but the commonest denominator in an economic plan, the regulation of industry and labor. Is there something significant in finding political organizations and economic policies the commonest factors in the new formulas?

In its effects, nationalism impinges on the whole gamut of human relations. Nationalism is preoccupied really with domestic problems, with manipulation and development within the four corners of its own political boundaries. Yet it is easier to observe and contrast it first against the common standards of international relations.

In the problems of traffic between peoples there has been in recent years a relative simplicity and uniformity of practice and principle. The principles rest upon the theories of either laissez faire or liberalism. Against this silhouette we can lay for contrast the contours of the new procedure. The ebb and flow of human life, the contacts and problems which arise across national boundaries, can be thrown for convenience into five groups. There is an interchange of goods and materials between nations, with problems we classify under foreign trade, tariffs, embargoes, commercial treaties and similar topics. There is also an interchange of money and credits, mostly the latter, with the connected topics of exchange, gold standards, and international debts, private and public. There is a traffic in human beings, with problems of immigration and travel, sojourn and extradition. There is a flow of ideas and culture, involving the infiltration of literature, art, learning, social standards, education and sentiment from one country to another. There are conflicts also of force, with discussions of armament and disarmament, arbitration, disputes and misunderstandings, and indeed all the lore of war and peace included.

In all these fields the new policy threatens transformation of our old approach. A wide view brings home to us how deep the currents run, how false it is to treat the phenomena of the new nationalism as a mere problem of free trade, or treaty policy or disarmament or currency stabilization, capable of easy negotiation. In the field of trade, the establishment of internal regulation by law controlling production, hours and rewards of labor, markets, and prices has taken a sudden leap forward in the old slow path toward socialized industry. We find all the nations now engaged in some degree or other in a hasty construction of artificial disciplines and systems for industry. These systems themselves require protection from abroad.

No government can prescribe wages for labor, for example, or provide an artificial market price for wheat without at once effectively walling off foreign goods produced under a different regime or under no regime at all. Higher tariffs, embargoes, even the restriction of trade to government agencies alone are measures which lie near or far ahead on the path of this procedure of regulating domestic business and prices. The older treaty policies regarding commerce were based either on the Anglo-American tradition of equality expressed in most favored-nation treaties or on the French system of special favor bargains. They both rested on a theory of encouraging private trading and assumed some laissez faire and freedom for enterprise. These treaty forms require a re-examination from the bottom in the light of the new domestic programs.

In the field of money and credit between nations, the tendency to establish managed money systems has long been evident. The plan now precipitated, notably in Sweden and the United States, of managing money to maintain a certain price level, undermines the whole system of balancing payments between countries by the operation of exchange depreciation and the shipment of gold. The conversion of one money into another when the value of both currencies is to be altered from time to time against world levels involves a new technique. The free movement of men across international boundaries has already been much affected by new hindrances to immigration, provoked by considerations of labor supply and national resistance to the results of mixing alien social standards. The interchange of culture is affected by such exhibitions as the burning of books in Germany and the embargoes on export of art when national pride is offended. Any observer of the recent emphasis on national culture so extreme as Ireland's effort to resuscitate Keltic and the stimulus to revive old tongues in Eastern Europe knows how far men may go to set back the use of common language to the ends of common understanding. Then we turn to the problems of force between nations. We find in spite of the growing sentiment for peace that the new policies may accelerate dispute and national dissympathy while the emblements of war grow thicker. The one clear conclusion is that the new nationalism penetrates and unsettles nearly all of our once accepted tenets for the healthy conduct of traffic and cooperation between the nations.

The depth of the new currents is tested also by the failure of several earnest efforts to offset the trend. The world has been flooded for years, through literature, education, and other means, with

the propaganda and philosophy of liberalism. Toleration, free speech, free trade, the merits of a world economy and a faith in the diffusion of art and science regardless of national limits have stirred the eloquence of our most valiant leaders. Such also are the teachings of the universities in every land. Today all these principles are threatened by the almost necessary requirements—certainly the natural implications—of a new orientation. Vast and sudden social regimentation within national units requires the stilling of controversy and the death of criticism. Free speech itself is under fire. Russia, Italy, Germany and Japan have all met the inevitable spectre of the censor. The prayers of liberalism have not set back the sun or checked the tide. Nor is persuasion reestablishing free trade. Another plan to check the trend has taken the form of efforts at international negotiation. We have tried by agreement to cease and desist in our unholy ways. These efforts have been checked in a series of recent futilities. A disarmament conference, two world economic meetings and several efforts at peace by international pressure have yielded little or nothing. At the moment, a third line of effort remains and offers some promise. It is a line of escape, rather than contest. It is possible that group trade agreements, of the type of the efforts at Ouchy, at Oslo, in the Danubian projects (perhaps the British Imperial program is similar) may permit of enlarging the trade areas and therefore the economic units for enclosed societies. I know no other armies of relief from the extremes of nationalism. The meagre results of the three campaigns just mentioned make bold the vastness of the social movement with which we deal.

There are, of course, some tempering agencies at work, which may prevail. The interdependence of modern peoples, with their conspicuous needs such as rubber, coffee, cotton and metals of specialized origin will work against self-sufficiency. The invention of substitutes, the encouragement of local crops under artificial shelter such as subsidies for wheat, cotton and sugar, the ease with which machine production is installed even among backward people and in adverse climates, all show how far ingenuity can overcome a country's natural handicaps. Again the dread of war may check the effervescence of national pride and exuberance. It is even possible that the powerful and centralized governments required for the new regime may themselves show capacities for self-restraint beyond our hopes. Such governments in Russia and Italy have already sometimes exhibited a temperateness rare in other forms of government. The very preoccupation with domestic development may make for peace in the future as it has in recent instances. The progress of socialization of business will not, of course, be as rapid as it now seems. Great inertia must be overcome. Great errors will be made and setbacks faced. All these conditions will slow the movement and temper its effects. They seem unlikely to halt effectively the vast experiments now under way to establish a more equal division of property and income within each nation.

The new conceptions make difficult problems for the smaller countries. The nations producing raw materials may be forced to revise their production. The difficulties with arranging the exchange of goods between countries under the new scheme may not be great enough to restore the old flow of raw materials. Individual enterprise is to be inhibited and the impulses to domestic protection and sufficiency are much enlarged. Moreover, the emphasis in present-day civilization tends to diminish the relative importance of raw materials. Life is becoming less a matter of bread and iron than of services and amenities which each country develops at home. The nations of limited area and population face difficulties in accommodating themselves to a world whose streets are walled and hedged like an English village. Large area, great population, a variety of natural resources, and diversity of climate all make easier the new ramparted economy for nations which possess them. The policies of some of the smaller European countries which were trimmed off after the war have given momentum to the trends we are discussing. Perhaps the smaller countries may in turn lead us to the means of escape from the obvious dangers to healthy and flexible civilization which the new plans contain. Among the smaller governmental units, the motives for amelioration will be strongest.

We have from various approaches been endeavoring to describe and explore the lineaments of this new image of social organization which has risen like a genius from the lamp. From its own features in various lights, from its contrast with older lineaments of social life as we have known them and admired them, from its victories and its enemies, from its effects on our existing status, we have tried to test its character and motion. The form it now assumes may not be permanent. The giant may shrink, or be remolded into a new visage and costume. Some insight into the real forces which have summoned this nationalism so suddenly in full regalia into our household, may be worth attempting. Its substances may be more enduring than its present forms.

Some sorts of nationalism are old in history. Our current forms are new. One sort of self-cultivation, of ethnocentrism, as it has been called, appears in primitive people. The belief that our own model of society with its individual beliefs and standards should not only be nurtured but even be forced upon others has had many manifestations in the past. In days of emphasis on religion, as during the Mohammedan invasion and in Medieval Europe, in the Crusades and the Inquisition, this impulse almost dominated the aims of life. It was nationalism in a religious dress. When, two or three centuries ago, political liberty and self-government gained the stage, we began to hear much of Italian nationalism and of German, North American and Latin-American struggles for political unity and self-government. The constitutions of the Eighteenth century are all written on this melody. President Wilson's fourteen points, and the present Irish, Indian and Philippine movements may be among the last great repetitions of this old music in the hearts of men. Its notes and chords remain in the present symphony, but they no longer are the major theme.

It would seem we are waging now a battle for economic democracy where once we fought for political freedom and suffrage. The nations today seem really concerned with avoiding interference from each other in order to establish separate and closed experiments in the control of property, labor and production. This is true of Russia in its simplest form. It is true of the present impulses and

plans which dominate the United States. It is largely true of Fascist Italy and, however confused the voices may be in Germany, economic distress and the demand for freedom from foreign economic burdens, are major and perhaps controlling factors there. The part played by the turmoil over race and culture in Germany is really a surface affair of lesser substance. Thus we see extreme Socialism as in Russia, Fascism as in Italy and Germany and a school called "economic planning" in the United States, each emphasizing the need for a unified and high-walled political retort in which to carry on experiments in the chemistry of controlled industry. Each experiment, different as are the methods and the philosophies, is an effort by means of propaganda and legislation to mold a society and for that purpose to close it off from the looser influences of world trade and the influx of foreign standards. This is a new aim for nationalism or perhaps more properly a new cause which is clothed by the garments of nationalism, and which borrows its mummery and its sword. The Western world today seeks economic aims as it once sought religious and political goals. It may in time move into fresher battlefields involving social and cultural aspirations, thus passing over the conquered trenches of the present conflict and those past, but we are today enlisted or drafted in an economic campaign. If this is true, nationalism now deals with property and capital and therefore with the very gardens of the lawyer and the law.

There seem to be some other subtle forces at work. The progress of invention has shrunk the world's dimensions. The nations have wakened to find themselves in sudden intimate proximity. The privacy and shelter to national life, and the independence in social and economic standards which time and distance once provided are suddenly removed. A shrinking tendency seems evident. We are suddenly exposed to each other by the press, the steamship, the telephone, the radio, and the aeroplane. We turn to whatever shelter political walls can furnish. We try to pull the curtains, lock the doors and keep our national lives uninvaded by the alien sounds next door. This retraction is at least evident in connection with the dread of war. No single sentiment has been so well preached and so generally disseminated in the last decade as pacificism. The poetry of war, of its glorious exercises and its victories and heroism, is outmoded in most Western nations. When we find our efforts to replace war by political or judicial methods frustrated and our eagerness to disarm met by distrust, isolation is a natural resort. The alternative is international cooperation with its implication of the superstate and a world police in the long view. This prospect is much more complicated than is resort to mere aloofness. Time may show that retraction is no remedy at all for war, but this policy of retreat into our own households has its traditions in several nations and its philosophers in all. The diplomacy of both Russia and the United States is influenced by this view. Great Britain is not always untinted by its hue. There is at least just now some evidence of nervous reaction to the impingment of a crowded world. The emotion is familiar in people singly and is not unknown in national histories.

These currents—the movement towards economic equality with its need for disciplined political units within which to experiment, and the impulse to isolation as shelter from our new exposure to each other—seem to me the deeper forces of good and evil which have summoned the old nationalism like a spectre of the lamp. The second impulse may be transitory. Indeed it seems unsound in the light of experience. The first, the cosmic tide towards a new sort of economic democracy, seems deeper and more permanent. We have seen the eddies and even the larger currents of this tide in many countries and in many tongues these hundred years or more. Equality in wealth is an old theme, a minor strain in every Utopia written from Plato to Wells and Bellamy. In recent years the adventure to attain it seems really launched.

If our survey has been even partly accurate, it should yield some dim conclusions for the lawyer and the public man. The problems, the results of the new program are both domestic and intergovernmental. The contrast between the old and new necessities of international relations have been already mentioned, but let us venture to speculate a little further on the new problems. In the international field, the management of public affairs still rests in the vague field of statecraft. The arts are those of diplomacy, negotiation, agreement and force. Only a small part of the conduct of international affairs has matured enough in practice and principle to be assigned to the pseudo-scientific regime we know as law. The conduct remains a field of experience and skill. Here the statesman meets a swarm of altered problems. The design of treaties covering trade, even transportation and residence, may need new patterns. The coming and going of trade and its hand-maidens, debt and credit, will be much hampered. The doctrines of free commerce were the creed of liberalism. They may give way to practices of canalized trade and even governmental trading as the need develops in our new industrial politics. Even the international movement of men and ideas is coming under suspicion in nations which are intense in the business of establishing new and rigid institutions. Already travel in Europe and Asia moves lamely under political scrutiny and travel in Russia has been lubricated hesitatingly. The famous Calvo clause, with its limitations on alien residents, seems a logical instrument of the new regime. The practices of international traffic and adjustment in both peace and war may need some new philosophy. The sensitive membranes that govern sympathy and understanding between the nations will be assailed by the arrogance, provincialism and emotionalism that characterized also the earlier nationalism. Peace will need some new devices.

Domestic government is the real concern of the lawyer. Here our profession with its common law inheritance may face great readjustments of ideas, employments and technique. The law has been more than a mere stabilizer of society. The lawyer has been more than a craftsman in the mechanism of real estate conveyances, contracts, corporation formulas, criminal indictments and evidence. The least of us in the legal profession has been since Roman days and is today a guardian and transmitter of social and governmental principles as well as a technical craftsman. In recent generations these traditions have conformed to the experience gained in the great struggles for liberty of opinion, political freedom and modern systems of property. We learned from the excesses of both

the Stuarts and Cromwell and from the French Revolution. We learned from the wreckage of the Feudal system and the confusion of a frontier conquest of new lands. The lessons have been deeply engraved upon us, as was fitting and necessary if we as agents of government were to remember and preserve the principles so easily forgotten by the mob. A suspicion of government meddling in business, a sense of sanctity for property, an emphasis on freedom and obligation in contract, a tolerance of debate and criticism, a patience with democratic processes for the good that was in them after all —these are the heritage of the Anglo-American Bar. They are the heritage of the lawyer in all other modern countries in some degree. The new philosophy may not discard these charted courses all together, but it lays another emphasis upon them. A chief function of the new government is to be the molding and manipulation of business. It no longer will meddle in business. It will command it. Property is to be punished for its sins. Its ambit will be narrowed. Men will be fitted for their own good into Procrustean beds of status instead of wrapping themselves in the flexible blankets of contract. There are signs that freedom of expression will be under suspicion. A regime which must have uniformity to prosper, and which can make transformations only in the hush of unanimity, can tolerate little discussion on printing presses or soap boxes. It will be easy for the people to forget the lessons of the recent centuries of political struggle in their new endeavor for new aims. The preservation of what needs preserving rests largely with the lawyers and the judges. They must choose wisely, be temperate and sometimes be valiant for the welfare of mankind.

The lawyer's employment and his technique will alter. The wholesale resort to a wide authority and discretion entrusted to public officers is not only the tendency of the hour everywhere but seems a necessary demand for the execution of rapid experiments in social management, the inculcation of new conceptions and the alternation of permission and refusal explicit in a program of a disciplined economy. The common law has had little sympathy for such wide official scope. It scorns such marching and counter-marching and dreads its abuse. The judicial proceedings favored by the common law are characteristically begun after the event. They trust to restoring justice and balance by damages and penalties. Now the event will often trammel up the consequence. The common law was full of safeguards, slow for the sake of securing deliberation and of giving cooling time. The new official discretion will move rapidly. It may destroy beyond restoration, entangle beyond unwinding. Roman and Oriental law have had wide experience with such administrative methods. These legal systems were evolved under and were well used to governments of men and not of law. Their scholars have developed a technique for the control of official discretion, well exemplified in modern France for instance. The nations which follow the Roman law have learned that a class of career officials, scorned by our traditions under the name of bureaucracy, can be trained to some restraint and responsibility in the exercise of wide powers. While the new regime repudiates many tenets of English common law, it cannot be left free to proceed without chart or principle. New doctrines must be found. The outlines of economic laws, industrial practice and other social observations have already superseded older legalistic guides in the conduct of railroad and public utility tribunals on this continent. The same type of resort to wide fields of observation or learning seems natural for the spread of administrative practices over the whole field of business. The lawyer must outline new rules and systems for control of administrative discretion. He must invent them or find them in Roman and Eastern sources. He must apply himself to social principles our law books never bound in print.

The drift is already under way. The skeleton of the common law is already fleshed with many modes and concepts that Coke and Blackstone never dreamed. We are now used to practice in tax, compensation, industrial and utility tribunals that are wrestling with all I have suggested. Even the criminal law is moving into fields of equity, discretion, probation and experiment that are equally new and equally framed to fit a new paternalism and flexibility. The point at the moment is to discern how deep the flood is flowing, how far it carries our crafts from the known and trusted landmarks of Anglo-American experience, how much the lawyer may be called upon to revise his charts and his methods of navigation. The law and its profession will survive. They have survived the social transformations of at least a score of centuries, with revisions of principle and motive as deep as those we visualize or deeper. In the end, the law is a craft and the lawyer the craftsman of social principle, sometimes called justice, and the importance of such principle grows not less but greater with complex society.

The panorama we have painted is, I suspect, a gloomy portent to the lawyer's eyes. I do not speak as a missionary for the new regime. I see its turmoil and its wreckage. The hour has been devoted to an effort to forecast, as nearly as we can, as realistically without lament or exaltation, as we may, the waves and winds that now control the voyage. The outlook is for major changes in the whole field of principles of law and government. The death of old things by the hands of new is always sad. The parting from old anchorages, the fall of landmarks bring their pangs.

Yet there is sunlight in the stormy picture we have painted. The socialization of industry is aimed at the obliteration of poverty, surely a noble aspiration. Our new adventure is to discover one more India, open one more continent of hope in the long voyage of social exploration. Its method of enclosed economies and tense, walled units of government is a means and not an end. We may ignore but we will not long abandon or forget the old lessons of danger and abuse in great authority. It is even possible that the development of sternly regimented national units may be a necessary and preliminary step in the progress to sound international relations, cooperation, order and culture on a world scale. Life is always a compromise, a balance, a trading of good to avoid evil, a sacrifice of old treasures for new needs. The new programs will remold the lawyer and the law, as they do other groups of men and doctrines, but they deserve and need the lawyer's skill and understanding and the light of his professional experience. The nations need his seamanship in this new venture of the fleet on glamorous but all uncharted social oceans.

FEDERAL LEGISLATION FOR CORPORATE REORGANIZATION; AN AFFIRMATIVE VIEW

Defective and Wasteful Character of Present Machinery for Corporate Reorganization—Remedy for Inefficiency beyond Power of State Legislation and Constitutes National Problem Requiring Uniform Treatment — Federal Bankruptcy Power Is Adequate for Its Solution*

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THE 72d Congress enacted, under the Federal bankruptcy power, a summary procedure for the reorganization of railroad corporations unable to meet their debts at maturity.

A companion bill, dealing with corporations other than railroads, though passing the House, failed of enactment in both the 72d and 73d Congress, due doubtless to the pressure of more important matters.

In the light of the necessity for dealing with the billions of dollars of corporate debts now outstanding in the country upon enterprises with greatly diminished income and greatly shrunken capital value, legislation dealing with the subject of reorganization of insolvent corporations will be of importance in the next session of Congress.

Is this subject matter one to be dealt with by Federal legislation, or is it one to be left to the present state of the law, with such aid as may be furnished by legislation of the several States.

This is really three questions:

(1) Is there need for any legislation dealing with the subject matter?

(2) If so, is it better that the problem be dealt with as a national problem or as forty-eight local State problems?

(3) If it is a problem best to be dealt with nationally, does the Constitution give to the Federal Government adequate power to deal with it?

The answer to the first two of these questions can best be adduced by an analysis of the present judicial machinery for reorganizing insolvent corporations other than railroads. Today manufacturers have located their factories and assembly plants under single ownership in every part of the country. Chain store systems have flung their stores into all of the 48 States. Even the local factory, all of whose plants are within the confines of a single State, will, if it achieves any position of substance in the industrial world, buy a large proportion of its supplies from without its own State and will in turn enjoy a substantial custom beyond the boundaries of its own State. Business has outgrown State lines.

Meantime the judicial machinery provided for the reorganization of temporarily financially embarrassed business, is that adapted to the era of the localized factory—finding all of its materials and all of its customers within the radius of a few miles, and to the local retail shop.

But why such an indictment?

An incorporated business venture whose properties and activities extend over any substantial area is, from the moment rumors begin to circulate as to its financial difficulties, subject to the risk of complete disintegration through attacks upon it by small creditors. The levy of execution upon its properties or the snap appointment of receivers in a State court may be a signal for the appointment of receivers in local courts in all the States in which the corporation's properties lie, and it is a substantial certainty that in each of the State receiverships the receivers will be different persons. Meantime, notwithstanding the absence of insolvency in the sense of that term as defined in the present Bankruptcy Act (i. e., excess of liabilities over assets at fair valuation) there is serious likelihood that some member of the Bar, alert to the possibilities, will have gotten together three creditors with claims sufficient to enable him to file an involuntary petition in bankruptcy. Often numerous such petitions are filed in various courts.

The only practical escape which a corporation and its creditors now have if its financial situation subjects it to such a risk, is to arrange, in advance of such an attack, with one of its creditors, who has an overdue claim and is a resident of a State other than that in which the corporation is domiciled, for the filing of a creditor's bill in a Federal court in a district in which the corporation is operating. The action is one in equity designed to subject the assets of the corporation to the payment of the plaintiff's debt, in the nature of equitable execution. It seeks such relief on behalf of all creditors similarly situated, in the nature of a bill of peace to avoid multiplicity of actions. The basis for Federal jurisdiction is diversity of citizenship. The prayer is for the determination of the rights of the respective creditors, the ultimate sale of the corporation's assets for the benefit of all the creditors, and, pending the sale, for the appointment of a receiver. The corporation then answers, admits the allegations of the bill and consents to the appointment of receivers.

While in the case of a railroad corporation the jurisdiction of the Federal district court in which the bill is first filed and the receiver appointed may be extended throughout the Federal circuit in which that district is located, this is not true in the case of a corporation whose property is not of a continuous nature, as, for example, a chain store system. It is therefore the general practice under such circumstances to

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file so-called ancillary bills in all other Federal districts in which property is located.

The utter impossibility of maintaining the going-concern value, or even effective operation, of a corporate debtor's property under such circumstances in the absence of some cooperation between the various courts appointing receivers, has been so apparent that there has grown up in the Federal courts the practice of treating the court in which the creditor's bill is first filed as the court of primary jurisdiction, with full administrative authority over the entire venture, and the courts in the other districts, as courts of ancillary jurisdiction. This practice, however, does not prevail as between the State courts of the several States, and even in the Federal courts depends wholly upon comity, that is, the courtesy of the judges before whom the corporation is brought after the first appointment. It frequently, if not indeed usually, happens that the subsequent courts insist that, though they may appoint as one of their ancillary receivers a person appointed receiver by the court of primary jurisdiction, they will add as another ancillary receiver some one personally known to the subsequent court. Thus it may, and usually does, happen that though one of the original receivers may to a degree preserve the unity of the venture by being appointed in some or all of the other circuits or districts, the fact that the receivers are not identical in all the districts operates as a definite disintegrating influence.

But apart from the tendency of the present practice to break up the business which the courts are, at least theoretically, endeavoring to preserve, the waste and expense to creditors of the legal machinery thus brought into play is intolerable. Each receivership in each district in which it is necessary to bring proceedings involves a fee to counsel for the plaintiff, for the defendant, and for the receivers in that district, and if any additional receiver is appointed for the property within the district, still another fee to that ancillary receiver.

But the adoption by a corporate debtor even of the wasteful and inefficient machinery now available to it, in an effort to preserve the unity of its business and assets for its creditors and stockholders, may result in the charge that the Federal proceedings are collusive. This contention, however, was overruled and the practice described sustained by the United States Supreme Court in *In re Metropolitan Railway Receivership*, 208 U. S. 90 (1907). Of course the courts should zealously guard against the abuse of the procedure described and should make sure that upon the facts there is real equity in the bill, that is, real necessity for the preservation of the defendant's business for the benefit of all of its creditors. So, too, the Federal courts should be zealous to see that there has been no unseemly attempt to divest the jurisdiction of a State court in a proceeding already brought in the State court, as well as not to permit the use of the suggested procedure in connection with a conveyance in fraud of creditors. Such were the facts before the Supreme Court in *Harkin v. Brundage*, 276 U. S. 36 (1928) and in *Shapiro v. Wilgus*, 287 U. S. (1932), in which, while reaching results obviously correct on the facts, the opinions contain language which, when removed from its context and the color given by the facts, is often cited to embarrass counsel seeking to preserve for the benefit of creditors the integrity of temporarily embarrassed corporate ventures.

But, it may be asked, why is not the present Bankruptcy Act adequate to meet our problem, as it permits voluntary proceedings by the debtor itself, notwithstanding the non-existence of bankruptcy insolvency, and the jurisdiction of the court in which a trustee is elected is nation-wide. Under the present Bankruptcy Act, however, no machinery is provided for dealing either with secured claims or with tort claims or landlords claims under broken leases or the many other classes of claims not provable in bankruptcy but to which, under the doctrine of Northern Pacific v. Boyd, fair treatment must be accorded in any reorganization to which stockholders of the insolvent are admitted. It is for these reasons primarily that the machinery of the present Bankruptcy Act is almost impossible of adaptation to a satisfactory corporate reorganization, notwithstanding the advantage which it affords through the elimination of ancillary receiverships by reason of the bankruptcy trustee having a nationwide title to the insolvent's property.

However, there is no certainty that resort to bankruptcy proceedings may not be adopted by counsel bent on bedeviling the situation. The filing of an involuntary bankruptcy petition, even after the appointment of receivers in an equity proceeding, furnishes a basis for troublesome litigation in the present state of the authorities and casts a cloud on the authority of the equity receivers in their dealings with the debtor's customers. In any event, such a petition, which may involve complicated issues of fact, must be gotten rid of before a reorganization can be consummated in the equity proceeding.

As already pointed out, the appointment of a receiver in the conventional equity proceeding is relief merely ancillary to the enforcement of the plaintiff's claim and the ultimate relief sought under the creditor's bill. This ultimate relief is the sale of the debtor's property and it has been the predominant view that such a judicial sale is necessary to effect a corporate reorganization to which there is not unanimous consent of creditors and stockholders. If, as is usually the case, the debtor has one or more mortgages upon its factories or other properties, proceedings must be had for the foreclosure of such mortgages. Here, again, difficult questions of jurisdiction arise when the mortgages cover property wholly outside the territorial jurisdiction of the court of primary jurisdiction under the creditor's bill.

But apart from jurisdictional questions, all these proceedings looking toward an ultimate sale of the property must proceed through determination of the validity and extent of each of the liens, the setting of a day of sale, the determination whether there shall be an upset price and, if so, in what amount, the sale itself, and the ultimate confirmation of the sale, involving, under the present generally adopted practice, a judicial determination as to the equity of the plan pursuant to which the property has been purchased. What a field this affords for waste and dilatory tactics. Resourceful minorities with no substantial equities in their position frequently, though losing at every stage of the proceeding, succeed in delaying for years reorganizations having the substantially unanimous approval of the security holders and ultimately found by the courts of last resort to be entirely equitable and valid.

And yet the sale ultimately had after all this effort is, in most cases of large corporations, more of a fiction than a fact. Seldom is there any potential bidder other than the security holders who have agreed upon a reorganization plan. The bid is seldom for more than the upset price and that price is usually paid in larg-

est part by turning in the claims against the proceeds of sale, held by the bidding group.

Judicial sale has generally been regarded as necessary to effect reorganization because of general agreement that in the existing state both of statutes and judicial decisions, creditors may not be compelled, without their consent, to take securities in the reorganized corporation, but are entitled to the cash value of their interest in the debtor's property.

Recently, in *Coriell v. Morris White, Inc.*, 54 Fed. 255, the Circuit Court of Appeals for the Second Circuit took the forward-looking view that while the creditor is entitled to the cash value of his claim and cannot be compelled against his will to take new securities in the reorganization, the right to cash, and not the right to a sale, is the substantial right of the dissenter, sale merely being a procedural remedy for which a particular case may permit, if not require, the substitution of a substantial equivalent, such as appraisal. It is unfortunate that the Supreme Court upon the appeal in this case refused to pass upon the question of principle involved, sending the case back to the lower court solely upon the ground that the lower court did not have before it an adequate record upon which to determine the fairness of the plan.

But even if the procedure of the *Morris White* case had been sustained by the Supreme Court, it would still leave clouded with uncertainty the size of the assenting majority which would justify the court in dispensing with a sale and relegating dissenting security holders to the cash value of their claims determined by appraisal.

Furthermore, even under such a procedure, every creditor not affirmatively assenting to the reorganization plan would be entitled to receive the cash value of his interest. This means that though two-thirds of the creditors have affirmatively assented to a reorganization plan, it still could not be consummated, even under the principle of the *Morris White* case, unless the reorganized company were able to provide cash for all creditors who had not affirmatively assented to the plan at the time the court confirmed the sale. It would seem that the preservation of such a right to the non-assenting security holders and the imposition of such a burden upon the reorganized company unduly stresses the rights of the individual creditor as contrasted with the public interest in the continuance of financially sound businesses, particularly in the case of public utilities. A much more sound balance between these conflicting factors, it is submitted, would be found in compelling all creditors to accept the provisions made for them in a reorganization plan which, after due hearing, the courts have determined to be equitable as to such creditors and which has been assented to by say, two-thirds of such class.

Archaic machinery subject to the defects which have been pointed out should not be continued without material improvement during the next few years when the rehabilitation of financial structures of essentially sound corporate ventures will be a problem of paramount importance. Clearly, therefore, the answer to our first question is that legislative relief of some sort is necessary.

Clearly, too, our analysis of the nature of the defects of the present machinery establishes that most of these defects cannot be cured by State legislation. Were the present jurisdiction of the Federal courts based upon diversity of citizenship to be abolished, as has been threatened, and no substitute machinery for the reorganization of insolvent corporations provided for under the bankruptcy power, ultimate business recovery would be delayed many years by the welter of confusion into which insolvent corporations would be plunged through being remitted to the courts of forty-eight States with forty-eight differing and often pitiably inadequate statutes for dealing with these problems.

Not only would the remission of these problems to the State courts necessarily result in multiplicity of receivership proceedings, with the gross waste that would result therefrom, but as each State would be limited to the property within its own boundaries in effecting the necessary sales to accomplish the ultimate reuniting of the properties, there would be as many separate sales as there were States in which the properties were located, with differing procedure affecting each of those sales and, obviously, greater likelihood of the complete break-up of the unity of the venture, to the great loss of the security holders.

The additional number of forums involved would but multiply the opportunities for holdup tactics by dishonest minorities and their counsel.

Furthermore, while a State court might, so far as its local property was concerned, provide adequate machinery for reorganization, meeting in respect of that particular property some of the defects which have been pointed out in the present machinery, nevertheless the decree of the local court would be binding only in respect of that property, though perhaps also upon local creditors, and would leave non-resident creditors with claims against the corporate debtor wholly unaffected and open to enforcement against other property of the debtor in other States at their full face amount.

Nor can any practicable remedy be supplied under procedure in the State courts of the debtor's domicile. Can it for a moment be conceived that a Delaware corporation, with its property located wholly on the Pacific Coast and doing all of its business west of the Rockies, all of its creditors and all of its customers being non-residents of Delaware, could be effectively reorganized in the courts of Delaware? Public opinion, already hostile to the tramp corporation, would never permit such procedure.

Nor could state legislation, binding dissenters to take securities in a reorganization, whether of the debtor's domicile or of the situs of the debtor's property, escape serious question under the constitutional prohibition upon State legislation impairing the obligation of contracts—a question which would be escaped by Federal legislation under the express constitutional grant of the bankruptcy power to the Federal Government.

Nor can any State court procedure obviate the risk inherent in appeals to the present bankruptcy procedure by destructive minorities.

Every argument, it is submitted, points to the desirability of dealing with this problem as one of national rather than State law. Indeed, this is the present practice either under the impracticable machinery of the present Bankruptcy Act or under the defective machinery afforded by the present Federal equity procedure.

All of the defects which have been pointed out in the present reorganization machinery have been remedied by the Railroad Reorganization Act which, (save for an unfortunate confusion between questions of private rights properly determinable by judicial proceedings, and questions of public interest properly to

be passed on by the Interstate Commerce Commission as an administrative body) provides a wise and effective instrumentality for accomplishing the financial reorganization of insolvent railroads. Similarly, save for certain defects of detail, the Bill which in the last session of Congress passed the House provides a like remedy in the case of corporations other than railroads.

It permits a corporation unable to meet its maturities to file, in the Federal court in the district in which it has its principal business office or its principal assets, a petition stating that it desires to effect a reorganization. Upon the approval of the petition, the court obtains jurisdiction over the property of the debtor throughout the United States as against any State or Federal receivers theretofore appointed in any other proceeding, subject, of course, to proper provision for the protection of obligations incurred by any prior receivers. The court may appoint a trustee in whom vests nation-wide title to the debtor's property, adequate provision being made for notice to creditors and stockholders as to whether such appointment shall be continued. Provision is also made for the institution of such a proceeding by creditors.

Provision is made for the proposal in the proceeding of reorganization plans either by the debtor or by creditors, and no reorganization plan can be confirmed until after hearing it has been found by the court to be equitable. Nor can creditors of any class be compelled to accept securities under the proposed plan until at least two-thirds in amount of such class shall have affirmatively assented to the plan. Unless the corporation is insolvent in the present bankruptcy sense similar consent of each class of stock, or proper corporate proceedings, is required. Classes of creditors, or stockholders in the appropriate case, of which less than two-thirds have assented cannot be disturbed without being assured the cash value of their interests, determined by appraisal, although upon the latter point an ambiguity in the present Bill certainly should be clarified. Minorities are thus given every possible opportunity to propose differing plans and to obtain a hearing, and cannot be overruled unless and until both a large majority of the creditors of the same class have approved the prevailing plan and the equity of the prevailing plan has been judicially established.

When this has been done the Bill permits the court by decree to omit all the archaic and fictitious procedure of a judicial sale, and, as the plan may provide, either to revest the property in the debtor subject to the readjusted capital structure or to vest it in another corporation organized for the purpose, free of the claims of stockholders and creditors otherwise than to the securities provided for them under the plan. Thus the delay, waste and inefficiency involved in the fictitious judicial sales of the present conventional practice are obviated.

But it has been asserted that such a procedure is not within the Federal bankruptcy power. This objection has been placed upon three grounds:

(1) That the Bill deals with debtors merely unable to meet their debts at maturity, whereas their assets may exceed in value the amount of their liabilities, the test of insolvency under the present Bankruptcy Act;

(2) That the Bill deals with secured claims, which no Bankruptcy Act to date has ever attempted to affect;

(3) That the Bill purports to affect the rights of stockholders of the debtor inter se, which, it is asserted, is no part of the bankruptcy problem.

Time does not permit of an exhaustive exploration of the legal questions involved. Suffice it to say here that these arguments all treat as limitations upon the constitutional power of Congress over bankruptcies the purely statutory limitations imposed upon the exercise of that power under the present Federal Bankruptcy Act.

The Constitution provides that "the Congress shall have power . . . to establish . . . uniform laws on the subject of bankruptcies." Bankruptcy at common law, and in all three of the Federal Bankruptcy Acts prior to the present Act of 1898, adopted without question the English common law definition of bankruptcy, viz.: inability to pay debts at maturity, and it was not until 1898 that the present definition involving a determination of the relationship of the value of the debtor's assets to the amount of his liabilities crept into the law of bankruptcy. Clearly, there can be no objection to the proposed legislation because it abandons the limitation upon bankruptcy procedure imposed in the 1898 Act and reverts to the standards of insolvency at all times followed at common law and followed in bankruptcy legislation prior to 1898.

So, too, congressional authority extends to the whole "subject of bankruptcies," and, as Story said in his Commentaries on the Constitution:

> "Perhaps as satisfactory a description of a bankrupt law as can be framed is, that it is a law for the benefit and relief of creditors and their debtors, in cases in which the latter are unable or unwilling to pay their debts. And a law on the subject of bankruptcies, in the sense of the Constitution, is a law making provisions for cases of persons failing to pay their debts."

Nowhere, except in the statutory limitation, has it ever been suggested that Congress could not deal with the relation between a debtor and his secured creditor. Indeed, it has always been conceded that a bankruptcy court may sell property within its custody free of any liens upon it, remitting the liens to the proceeds of sale. The constitutionality of composition proceedings provided by the present Bankruptcy Act has been unchallenged since the illuminating decision of Mr. Justice Blatchford, then sitting in the Circuit Court, in *In Re Reiman*, 20 Fed. Cases 490, affirmed 20 Fed. Cases 500, and if a majority in number and amount of unsecured creditors may by composition bind a dissenting minority to take securities of a reorganized debtor, there would seem to be no basic constitutional difficulty in arriving at the same result in respect of secured creditors. Indeed, in *Canada Southern Railway Co. v. Gebhard*, 109 U. S. 527, in passing upon the effectiveness as against American security holders of a Canadian Act modeled upon the English Act whose principles are adopted both in the new Railroad Reorganization Act and in the Bill now under discussion, the Supreme Court of the United States in a most explicit dictum expressed its view that such Acts are within the Federal bankruptcy power.

The objection that secured creditors may not thus be disturbed under the Federal bankruptcy power would thus seem to be untenable.

And while, since the point seems never to have been raised, there is no judicial authority to establish the power of the court in a bankruptcy proceeding to disturb the relation of the debtor's stockholders inter se, it is submitted that it is a very narrow view of the bankruptcy power which does not recognize that such

a disturbance is fairly a part of "the subject of bankruptcies," when such a disturbance of the stockholders' relationship is incidental to, and, as a practical matter, a necessary part of a re-arrangement of the relationship between the former creditors and their debtor.

Our conclusion therefore, it seems to me, must clearly be:

First, That the present machinery for corporate reorganization is so defective, inefficient and wasteful that its continuance is scandalous and its prompt rectification must not be permitted to be delayed by any assumed selfish interest which the members of the Bar may have in the potential professional income arising out of these very defects.

Second, That the remedy of the existing defects is quite beyond the power of State legislation, the problem being a national one requiring uniform national treatment.

Third, That the Federal bankruptcy power is adequate to the problem, and

Fourth, That, subject to certain defects of detail, the Bill which we have discussed provides an effective and wise remedy which should command the support of every member of this Association.

FEDERAL LEGISLATION FOR CORPORATE REORGANIZATION; A NEGATIVE VIEW

No Legal Precedent Which Warrants the Construction That the Federal Government Has Power to Alter a Contract between Stockholders of a Private Corporation Created by State Law, under Circumstances Falling Short of Bankruptcy—Subject of Bankruptcies Cannot Be More Extensive Than the Common Meaning of the Words, etc.*

BY JAMES R. MORFORD
Member of the Wilmington, Del., Bar

IN times of National stress, the disciples of nationalism with their advocacy of centralization of governmental functions and agencies, are in the ascendency. For every ill or supposed ill to which the body politic is heir, there is the cry "for a law"—a national law.

The past century has seen a steady growth of Federal encroachments on the rights of the States, some of which have been accomplished in a constitutional manner, others by virtue of the hue and cry of "national emergency." Gradually this child of the people, the National Government, has become a veritable "Frankenstein Monster" which threatens to destroy that other agency of its creator, the States. This has been brought about by shifting the emphasis from the "reserved powers" of the States to the "implied powers" of the National Government.

Much legislation induced by this trend has already been enacted. Other acts of like nature, including the proposed amendments to the National Bankruptcy Act dealing with "Municipal Debt Readjustments" and "Corporate Reorganizations" are still in prospect. It is with the latter of these two acts that the present discussion will deal.

The draft of the proposed "Corporate Reorganization" section has a provision permitting the compulsory alteration and adjustment of "the rights of stockholders generally or of any class of them." Indeed a corporate reorganization could rarely be accomplished without affecting in many material and important respects the rights and preferences of stockholders, and in many cases, the entire elimination of a junior class or classes or a substantial paring down of stated values and prerogatives of all classes of stock. May such results be accomplished by Federal legislation under the guise of a law "on the subject of Bankruptcies"?

At the outset, it is to be noted that the proposals submitted at the last session of Congress did not even purport to be "on the subject of bankruptcies." The amendments as passed and approved relating to "Compositions and Extensions" (Sec. 74), "Agricultural Compositions and Extensions" (Sec. 75), and "Reorganization of Railroads Engaged in Interstate Commerce" (Sec. 77) begin with the following statement:

> "In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings *for the relief of debtors* as provided in Sections 74, 75 and 77 of this Act." (Sec. 73.)

As pointed out by Professor Albert K. Stebbins in a recent article[1], the draftsman of the Act quite naively has placed his subject definitely without the Constitutional pale. If, therefore, the act as passed is not a "law on the subject of Bankruptcies" within the precise language of Sec. 8 of Art. I of the Constitution of the United States, but is one "for the relief of debtors" as declared, the mere fact that it is incorporated as a part of the National Bankruptcy Act cannot make it constitutional. The "Corporate Reorganization" proposal, as drafted, is subject to the same vice.

A corporation is the creature of the State of its incorporation. It is a citizen of the State under whose

*Address delivered at the special meeting of the Committee on Commercial Law and Bankruptcy at Grand Rapids on August 29, 1933.

1. Albert K. Stebbins, Esq., of the Milwaukee Bar, Professor of Law, Marquette Law School, Milwaukee, Wisconsin, in an article entitled "Is the Amendatory Law Unconstitutional?" in the April, 1933, issue of the Marquette Law Review.

laws it is organized.[2] Its charter is a contract between the state and the incorporators, and is within the Constitutional prohibition (Art. I, Sec. 10, Clause 1) against the impairment by the States of the obligation of contracts.[3] But a corporate character has an even greater significance. It is a contract between the corporation and its stockholders and between the stockholders *inter sese*.[4] While there is no constitutional prohibition against the impairment of contracts by Federal legislation, yet the alteration, adjustment or impairment of this contract between a corporation and its stockholders and between those stockholders *inter sese* is not within the proper and constitutional scope of Federal legislation unless specifically granted by the Constitution or necessarily to be implied from the powers granted.

The Federal Government is a political entity of delegated powers and possesses no rights or attributes except as conferred upon it. By the tenth amendment "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It has been well stated that:

> "The Federal government is one of limited and specific powers. It cannot exercise jurisdiction by implication, but is confined to the special grants of power in the Constitution; and in carrying into effect these grants, the most appropriate means should be adopted, and no means beyond what are necessary to give effect to the power, can be legitimately used."[5]

Any legislation, therefore, beyond the limits of the power delegated is a trespass upon the rights of the States or the people and is a nullity.

The creation of private corporations, the fixing of the rights of stockholders and all matters relating to the internal management of corporations are within the reserved powers of the States for the obvious reason that they are not "delegated to the United States." By virtue of the law of the State a corporation is born, its character fixed and the status of its members established. By that same law, its life and activities and the relationship of its members are governed and the corporate ills remedied. And by the law of the same State it dies, its corporate existence terminates, and the relationship of its members dissolves. By what authority may another sovereignty step in and during the corporate life alter and rearrange the rights and relationships of those members by attempting to prescribe for corporate ills falling short of "bankruptcy"? Where in the Constitution is the "implication" which would permit the Federal Government to alter a contract between stockholders of a private corporation created by state law?

There is certainly no legal precedent which warrants the construction that such power is delegated by the Constitutional provision relating to bankruptcy laws, because heretofore "laws on the subject of bankruptcies" have always been understood as laws dealing solely with the relations between insolvent debtors and their creditors. Such laws have never been considered as purporting to affect any other legal relationship of insolvent debtors, such as the relationship between insolvent corporations and their stockholders and certainly in no case the relationship between those stockholders *inter sese*.

It is held that the "subject of bankruptcies" includes the distribution of the property of a fraudulent or insolvent debtor among his creditors and the discharge of the debtor from his debts and legal liabilities, as well as all the intermediate and incidental matters tending to the accomplishment or promotion of these two principal ends.[6] It is to be noted that the very cases relied upon so strongly by former Solicitor General Thacher in his memorandum for the use of the Senate Judiciary Committee[7] so hold.

Creditors by reason of their seniority in rank are not interested in the rights of stockholders either in their relationship to the corporation or their relationship to each other. The assets of an insolvent corporation, after the payment of administration expenses, go first to the satisfaction of the claims of creditors. How, therefore, is the alteration of the rights of stockholders in any way "incidental" to the distribution of the bankrupt's assets among his creditors? It is true, it may facilitate a corporate reorganization, but a reorganization is not *per se* "incidental" to "proceedings in bankruptcy."

It is, of course, true that the Federal Government has all the powers necessary (in a broad sense) to the exercise of the powers specifically conferred upon it, but this principle must be given only a fair and reasonable application. In determining the extent of the grants of powers, there must not be used "that enlarged construction, which would extend words beyond their natural and obvious import."[8] This means that "the subject of bankruptcies" cannot be more extensive that the common meaning of the words, and laws are on this subject only when they deal with that set of legal relationships existing between an insolvent debtor and his creditors.

It must be borne in mind that we are here concerned with *the personal rights* of individuals under State statutes—the rights fixed by the stockholders' contract as created by State law. Such individuals in reorganization proceedings as proposed would not be before the bankruptcy courts and their rights, therefore, may not validly be altered by decrees of such courts.

Another constitutional objection to the proposed section relates to the status of the corporation which may benefit by its provisions. By the draft the corporation need not be insolvent in the bankruptcy sense but merely "unable to meet its debts as they mature." This same language appears in new sections 74, 75 and 77, and these sections, it would seem, are subject to the same vice.

Historically a bankrupt is but a broken bank or bench. Such bank or bench, or "counter" as we would now designate it, was the bench over which the trader or merchant conducted his business. It was broken for or by him as an evidence of the discontinuance of his business.

By the National Bankruptcy Act, "insolvents" as well as "bankrupts" as originally known are included. In this respect there was an undoubted extension of the common law definition of "bankrupt," and this extension is best evidenced by the often cited case of *Hanover National Bank v. Moyses (supra)*, where it was held that persons other than "traders" might be

2. Doctor v. Harrington, 196 U. S. 579, 49 L. Ed. 606; Louisville etc. R. Co. v. Letson, 2 How. (U. S.) 497, 11 L. Ed. 353.
3. Delaware Railroad Tax Case, 18 Wall. at p. 225, 21 L. Ed. at p. 894. Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. Ed. 629.
4. Yoakum v. Providence Biltmore Hotel Co., 24 F. (2nd) 533, Morris v. American Public Utilities Co., 14 Del. Ch. 136, 122 Atl. 696.
5. U. S. v. Cisna, 1 McLean 254, Fed. Cas. No. 14,795.
6. Pope v. Title Guaranty & Surety Co., 152 Wis. 611, 140 N. W. 348; Silverman's Case, 2 Abb. (U. S.) 243, Fed. Case No. 12,855; Hanover National Bank v. Moyses, 186 U. S. 181, 46 L. Ed. 1113.
7. Memorandum by Solicitor General relative to S. 3866 and H. R. 9068 to amend the Bankruptcy Act. Printed for the use of the Committee on the Judiciary—72nd Congress, 2nd Session.
8. Marshall, C. J., in Gibbons v. Ogden, 9 Wheat. (U. S.) 1, at p. 188, 6 L. Ed. 23, at p. 68.

adjudged bankrupt—a startling departure from the common law.

At common law, "bankruptcy" implied something more than insolvency. The additional requirement was some fraudulent act calculated to defeat the rights of creditors. The able article by Professor Stebbins above referred to develops fully this phase of the law and convincingly demonstrates its unconstitutionality on this point. His definition of a bankrupt is well stated as follows:

> "When the term 'bankruptcies' is used in the Constitution, it must therefore mean proceedings against persons who, being insolvent, have done something else in derogation of the rights of their creditors, the nature of the proceedings themselves and of the acts which would make 'bankrupts' out of 'insolvents' being granted to Congress to determine.
>
> "At this point a definition may be hazarded substantially as follows: A potential bankrupt is a person who, being insolvent, commits some act which sets him apart from all other insolvents and places him in a class subject to certain proceedings limited to persons similarly situated, known as proceedings in bankruptcy, but he does not actually become a bankrupt until a petition in bankruptcy has been filed in court and he has been formally adjudicated as such, the initiatory filing of a petition and other acts necessarily performed prior to the adjudication, being nevertheless 'proceedings in bankruptcy,' are directed solely to the end of an adjudication and are within the terms of the constitutional grant.
>
> "It is in this sense that the Judicial Code, at an early date, delegated to the District Court, 'Jurisdiction . . . of all matters and proceedings in bankruptcy.'"

In any event under the present Bankruptcy Act (before the amendments of March 3, 1933), the definition of "bankrupt" had become crystallized to include *either* "insolvency" (in the sense defined) *or* a fraudulent act affecting creditors *or* both. To this definition the new acts add another element and at the same time retain undisturbed the term "insolvency." The language is "insolvent *or* unable to meet its debts as they mature." A debtor falling solely in the latter category is not, I submit, a "bankrupt."

By the new acts Congress attempts to extend the jurisdiction of the bankruptcy courts over persons and corporations merely unable to meet maturing obligations. The absurdity appears from the fact that they are not even designated as "bankrupts." In addition to being acts "for the relief of debtors," the acts emphatically direct that persons or corporations taking advantage of the provisions shall be known only as "debtors." Only in the event the composition, extension or reorganization (in the case of a corporation) fails does the "debtor" become a "bankrupt." By thus recognizing the distinction between "debtor" and "bankrupt," the draft itself clearly demonstrates the lack of jurisdiction of the "bankruptcy court" in a proceeding, the express purpose of which is to keep the case out of the purview of "bankruptcies." Where a corporation successfully reorganizes under the proposed law, it never becomes a "bankrupt," and it is not intended that it should.

It may be argued that a voluntary petitioner for adjudication need not be "insolvent" in the bankruptcy sense. This is true, but it has been pointed out that the filing of a petition *praying for an adjudication in bankruptcy* is in itself an "Act of Bankruptcy" conferring jurisdiction. But a voluntary petition for corporate reorganization or a voluntary petition by an individual for a composition or extension cannot be regarded as a proceeding in bankruptcy for the obvious reason that it does not seek an adjudication as its ultimate aim. Such cases are merely those of "debtors" seeking "relief."

There is a fundamental difference between bankrupt corporations and corporations insolvent in the equity sense, i. e., unable to meet maturing obligations. When a corporation is insolvent in the bankruptcy sense, its creditors are equitably the owners of all the assets. They are the only ones entitled to be considered or consulted, and the entire proceedings, as now established by law and practice, is framed with the end in view of protecting and promoting the interests of those creditors. The theory of an equity receivership, on the contrary, is that there is not a deficiency of assets over liabilities, that the creditors are certain to be paid in full, and that there is an equity to be preserved for the stockholders if the property is not needlessly sacrificed. For this purpose, equity will restrain creditors from the exercise of their legal rights in order that the *corpus* may be held intact and the interests of stockholders protected without, at the same time, any undue prejudice to creditors.

In bankruptcy, only the creditors need be considered, because the proceeding is based upon the assumption, in the first instance, that the stake of the stockholders in the corporate enterprise has been dissipated or otherwise lost to them. An equity receivership, on the other hand, recognizes that stockholders' stake as still existing, in whole or in part, and proceeds on the assumption that by proper control of the activities of creditors, that stake or interest may be saved and creditors at the same time fully satisfied. In other words, "bankruptcy" and "equity insolvency" are almost as opposed in their recognized concepts as "torts" and "contracts," and no definition of a law "on the subject of bankruptcies" may properly include a subject so unrelated in legal principle.

If the proposal should become law, the Supreme Court of the United States will stand as the last bulwark between Federal aggrandizement and one of the fast disappearing rights of the States. The author of a recent note in the Yale Law Journal[9] says, in effect, that since there is no authority *clearly* indicating the unconstitutionality of the Act, the Supreme Court will not be persuaded by "abstract arguments," but will uphold it if it considers, as a general proposition, that the law is a good one.

It is difficult to subscribe to this rather dismaying view, because historical precedent has taught us that even in periods of national stress that august body will not permit its judgment to be warped either by popular clamor or the demands of the co-ordinate executive and legislative branches of government. That body has been responsible in the past for the preservation of our National Charter from legislative and executive prostitution, and the American Bar awaits with interest the ultimate determination of the validity of much of the recent legislation. Or, if the writer in the Yale Law Journal is correct in his prognostication (and certain by now historical cases somewhat shake my disbelief in his cynical doctrine), then it is incumbent upon the Bar to use its influence to prevent any such abortive process by which the Constitution is in effect rewritten by a body which has no right to do anything except to protect its fundamental integrity by applying to its terms the real intent, strict meaning and ordinary acceptation of its simple words.

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LOCAL ASSOCIATIONS AND THE NATIONAL BAR PROGRAM

MOST of the state bar associations and many of the principal city associations have already expressed their willingness to cooperate in the American Bar Association's effort to produce some unity in the work which is being done by bar organizations. Committees on some or all of the four subjects of criminal law, legal education, unauthorized practice and selection of judges have been appointed in many places and they are assisting by furnishing reports of their past activity and by actively working on some phase of the problem which falls within their jurisdiction. A number of associations are having speakers at their meetings on the general coordination plan and on the particular subjects which are being developed under it.

The small local association, however, still remains more or less out of contact with the scheme. The program which has been developed provides that the state association shall undertake the responsibility of informing its local associations what is being done, and of securing their interested cooperation.

How is the state association to do this? No set procedure has been laid down for all states. The method to be used in Illinois has been outlined by Mr. Allan Stephens, the energetic secretary of that association, as follows:

"We expect to have a committee of the State Bar Association of not over seven members who will determine the policies in carrying out the work. Of the four suggestions selected, the matter of the selection of judges is one in which there is little, if any, interest outside of Cook County, for our present methods have proved to be very satisfactory. The Committee would probably decide that the energies of the organization should be exerted along the lines of the other questions, except in Cook County.

"We hope to have prepared an outline of discussions of the various phases of the different subjects and go as far as we possibly can in suggesting arguments, both in favor or opposed to, such phase or suggestions of its solution. The November issue of Notes on Legal Education is in a general way about what I have in mind.

"As soon as this information has been collected and put in shape for use, we hope to send a copy thereof to each of our 111 local bar associations and urge them to appoint one, two, three or four committees to prepare an evening's discussion upon any particular subject they may select, endeavoring during the year to cover the entire range of subjects selected. We do not expect every local bar association to do this, but a large number of them will and from the results, I am very certain there will be an awakened interest in these subjects among the members of the bar of Illinois.

"We hope also to urge local associations to take any action they may deem advisable in carrying out ideas advanced in their discussions. At the present time, the State administration is fostering the organization of all crime prosecuting agencies along county lines and it may be that some of the local bar associations will be able to join this movement. However, we expect to leave the manner in which they will take care of the situation entirely to the local association.

"Every month my office is writing to the local bar associations and we hope to keep after them on this program and be able to report next spring that something has been accomplished."

In Wisconsin, President Rix is planning a conference for December 9th on the program of cooperation of the American Bar Association with local bar associations. The Board of Governors and officers of the Wisconsin association and the officers and representatives of all local associations will be invited to be present. A full discussion of the method by which each local association should take up the program will be included.

In Indiana, at the mid-winter meeting of the bar association, there will be a special meeting of officers and representatives of local bar associations for the purpose of discussing the program. In Michigan a similar meeting is being called. In Ohio the policy of holding regional meetings around in different portions of the state, under the auspices of the state bar, will be continued and the coordination plan will be put before these regional assemblies.

In states where it is not possible to hold meetings of representatives from local associations, the plan will be presented to them by letter and they will be urged to take action.

The word "coordination" has a smooth sound and it has been gratifying to have many state and city associations thoroughly agree that the proposed plan is a very worthwhile one. There is, however, no question that effective work must go deeper than the state and large city associations if it is to be more than a mere surface manifestation of a desire on the part of our profession for more influence and accomplishment. It must go to the very roots of the bar and it must succeed in interesting the small local association.

With a total of 1350 bar organizations in the country, it is impossible for the American Bar Association headquarters to communicate with each one of these and with their committees. It does, however, urge the small associations to get into the picture. As a means of doing this it suggests to the officers of the small associations, to its executive committee, or to any of its active energetic members, the following procedure:

(1) At the next meeting of the local association or at a specially called meeting, if there is to be no regular meeting in the near future, see that a few minutes are given to an exposition of the National Bar Program.* Any member of the State Council of the American Bar Association, or the state representative on the General Council, or a Vice President, member of the Executive Committee, or chair-

*Articles on page 562 of the October American Bar Association Journal and page 635 of the November Journal discuss the program. A pamphlet is available at the American Bar Association headquarters, 1140 North Dearborn Street, Chicago, Ill.

man of a committee of the American Bar Association is qualified to present the subject.

(2) To test the interest of the members, a resolution should be introduced following the speech, endorsing the program in general terms and authorizing the president to appoint separate committees to work on criminal law, legal education, unauthorized practice and selection of judges, or any of these, where they do not already exist.

(3) If the association wishes to cooperate in the program committees should be appointed at once by the president on such subjects as the association agrees are of local interest and importance with instructions to study and report on such problems in their field as they consider most vital. Material from headquarters of the American Bar Association is planned to help in this work by canvassing each topic and pointing out particular questions which are of principal importance.

(4) If the association votes favorably, the president should notify the secretary of the state bar association of the desire of his organization to take part in the movement, that certain committees have been appointed, and that he wants to have sent to him the material from the American Bar Association headquarters on the subjects to be taken up for distribution to these committees.

(5) The committees should be asked to make an intermediate progress report to the president within three months after their appointment, and a full report to be transmitted to the secretary of the state bar association, with a copy to American Bar Association headquarters, by May 1st, 1934.

(6) Final report of the committees on those subjects which prove of most interest should be discussed before the association, together with the questionnaires which will be sent out about the first of the year.

It is suggested that to secure action by committees the president of the bar association appoint interested members and keep in touch with the work of the committees. The energy with which this program is pursued in a particular association will reflect to some extent the energy of the association and the members who are guiding it. It presents an opportunity for any bar association which wants to take an active part in the national movement. Every one of the subjects under consideration are live topics and there is no jurisdiction in this country which can yet boast of having reached a perfect solution of any of them.

WILL SHAFROTH,
Assistant to the President.

Suspected and Fraudulent Wills

BY ALBERT S. OSBORN

WHEN a will is suspected, the first assumption is that the signature is a forgery, but there are many fraudulent wills that do not carry forged signatures. Where a holograph will needs no date and no witnesses, the history of wills shows that the law is known to fraudulent will makers, and any piece of paper with a little space above a genuine signature furnishes an opportunity to make a will. "All to my wife," over a good signature, is a good will in more than one state.

Besides fraudulent wills over genuine signatures, there are wills with substituted first and middle pages, and also wills mutilated by cutting away an undesirable portion. Then there are other wills purposely drawn with open spaces which are later filled in, and also wills where important names and parts have been chemically erased and new matter inserted. The sequence of crossed strokes, where added writing touches a signature, and the running of the ink of a fraudulent addition into a fold that also goes across a signature, sometimes are very damaging circumstances in wills that have been tampered with.

Unfortunately many of these evidences of fraud in wills, that are perfectly obvious to the trained and experienced examiner, are not seen by attorneys and others, who not only do not know what to look for in a suspected document and, even if seen, do not understand the significance of the evidence until it is explained.

The use of the typewriter has opened up many avenues for fraud although the typewriting itself of fraudulent wills sometimes furnishes the means by which their real character is positively demonstrated. The careless and improper way in which the separate pages of wills are fastened together furnishes a further opportunity for fraud, and the law in some states even allows wills to be written on several loose sheets of paper not fastened together in any way and not connected by context or subject matter. This practice and the law that permits it of course furnishes an open door to fraud.

In some cases there are decrepit testators with dim sight who do not sign the will read to them but place a signature on an under, projecting blank sheet which is afterwards made into a will. There is much perjury by alleged eyewitnesses of the signing of wills of this kind, who put their names on wills long after their date. Some of these witnesses do not understand the legal requirements at the time of their signing but in case of a contest often will commit perjury.

The temptation to make a fraudulent will often is very strong and in many cases, in order to bolster the fraud, a forged will in part carries out the intention of the testator. Many obviously fraudulent wills of this kind have been probated. Another ingenious method in designing a fraudulent will is to give a large bequest to a highly deserving local charity, with of course a substantial amount to the fraudulent maker. These wills often lead to compromise and fraud and forgery receive a large reward.

The actual circumstances out of which some undoubtedly fraudulent wills come to light are such that they are easily proved to be genuine, at least to the satisfaction of a jury. The case is decided on the theory, persuasively developed by the proponent's attorney, that if the will is not genuine it ought to be, and the case is so decided. There is no doubt a tendency in the law of certain courts in certain states to "strain for probate" and almost anything in written form may be construed as a will. Of all states Pennsylvania is one in which there is the greatest opportunity to make any old scrap of paper into a will.

The wishes of the dead would be more effectively safeguarded if wills, especially of the sick

and decrepit contained more writing of a testator than a mere signature. A few lines at the end of a will above the signature, saying, "This is my will; it has four pages. I have read it and approved it. John Doe," or a longer appropriate reference to the document, all in the handwriting of the testator, may, as a protection, be written in. There are certain wills that it is known when they are drawn will be very unsatisfactory to certain relatives, and it is especially important that a will of this kind, whose contents may lead to a contest, should be protected in this way.

Most fraudulent wills no doubt carry forged signatures and, against ingenious and unscrupulous advocacy and bold perjury, it is sometimes impossible successfully to attack a document of this kind, but with the new rules and procedure it is now possible to prove forgery, in cases in which it could not have been proved twenty-five years ago. With photographs admitted, and especially with the opportunity to give detailed reasons for an opinion, and with the ancient prejudice against this testimony no longer in force, forgery does not so easily succeed. As Professor Wigmore succinctly says, "The testimony is tested by its convincingness."

New York, April 26, 1933.

THE TRIAL OF THE ENGINEERS AT MOSCOW

Trial of Special Interest as Showing the Different Methods of Different Countries in Proceedings for Offenses against the State—The Elaborate and Strange Form of Indictment—Examination of Witnesses Extremely Direct and Informal—Anna Sergeyevna Kutuzova Exhibits "the Eternal Feminine"—Verdict and Sentence —Court Justified in Conclusion upon Evidence Adduced

BY HON. WILLIAM RENWICK RIDDELL, LL.D., D.C.L., F. R. HIST. SOC., ETC.
Justice of Appeal, Ontario

PROBABLY no criminal trial has for many years excited more general interest than that of certain Engineers, English and Russian, in the service of the Government of Russia, at Moscow in April, 1933—the crimes alleged being in respect of certain machinery and appliances under their control. In the United States, it is possible that, owing to the activities of some having the same economic views as the accused and others, the trial of Sacco and Vanzetti attracted more attention; but in the remainder of the English-speaking world, at least, the Moscow trial easily held first place.

The State Law Publishing House, Moscow, has published in three paper-bound 8vo. volumes, well-printed on good paper, in English a translation of the official verbatim report, from which alone, the statements in this Article are taken. It seemed to me that some account of this remarkable trial would be of interest to lawyers and others in our countries under a very different system. I should, however, premise that I have no missionary spirit—this article is descriptive only, not polemical—I recognize the right of every people to select the law and practice they think best for themselves, and however different from our own. I believe that our system is the best for us; but each people should choose what they think best for themselves.

On April 12, 1933, began a Special Session of the Supreme Court of the U. S. S. R. (Union of Socialist Soviet Republics, *alias* Russia). The President was V. V. Ulrich, a Member of the Supreme Court, and there were two who are called "Members of the Court," and one called "Member of the Court in Reserve"—these three were Engineers, and should be professionally skilled in most of the matters complained of. For the Prosecution appeared the Public Prosecutor and the Assistant Public Prosecutor, while for the Defence appeared nine "Members of the Collegium of Defence." Of the eighteen persons accused, one, a Russian, was certified as sick, and his trial was postponed. The others, eleven Russians and six British Subjects appeared, and were defended by Counsel, one for each of five British and one for the two others, while of the Russians, one Counsel appeared for two and the other three for three each.

Each of the accused was asked by the President his full name and patronymic, his age, his last occupation (the British, whether they were British Subjects) and whether he had received a copy of the Indictment? The accused answered, severally, and to the last question in the affirmative.

On being asked (the English in English), if they had any objection to the composition of the Court, all answered "No." Then the Indictment was read by the Secretary, corresponding to our Clerk of the Court.

Anything more unlike an Indictment in our sense of the word could hardly be conceived. Starting off with "Re" followed by the full names of all the accused (one of the Russians being a woman) the Indictment proceeded to set out that an official statement of the O. G. P. U. (State Political Department) published on March 14, 1933, stated that an investigation by the O. G. P. U. into a series of sudden and regularly recurring breakdowns which had recently occurred in big power stations had revealed that the breakdowns were the result of wrecking activity on the part of a group of criminal elements among State employees, to destroy the power stations. In this wrecking group actively participated certain employees of the British firm, Metropolitan-Vickers. A further investigation was

made and a Commission of experts set up, who examined into the matter and came to the conclusion that the breakdowns were due to criminal negligence or deliberate wrecking on the part of a number of persons in the technical personnel serving these stations.

Then an elaborate statement is made of the breakdowns in six different stations, together with the depositions and statements made by the various accused in the preliminary enquiry, sometimes when they were confronted with others or the statements of others. This takes up some 61 pages. Then follows separately the full name, birth-place, age, previous conviction, if any, married or single, British citizenship or not, and the charges upon which the accused is to be tried. The reading concluded of the Indictment, 74 pages long, the President asks each of the accused, "Accused (name) do you plead guilty to the formulated accusations?" All the Russians and one Englishman, MacDonald, plead Guilty; the other five British, Not Guilty on any Count; the Public Prosecutor tells the proposed procedure, which is not objected to; and the first day's Sitting comes to an end, until the evening.

In the evening, the chief Russian offender, Gussev, is called as a witness; and after being examined as to his birthplace and family, his education, his employment, his White Army and other military experience, he goes into the circumstances of the facts complained of. Two objects seem fairly plain: one object is to show the anti-Soviet sentiments of the accused witness, so as to make it probable that he would do such acts as he is charged with, for, as the Public Prosecutor states afterwards, in Russian Soviet Courts the Prosecution is not satisfied with a plea of Guilty, but investigates the facts; the other object is naturally to fasten guilt upon those who had pleaded Not Guilty. The Public Prosecutor examines at great length, leading questions not being excluded—sometimes, the accused MacDonald is asked to corroborate Gussev, and does so, *sub modo*. The Public Prosecutor having finished with the witness, the Assistant Public Prosecutor takes him in hand and further examines, chiefly as against MacDonald and his superior, Thornton. During this examination the woman accused is asked some questions bearing upon the statements of the witness. At the next Sittings, Gussev is further examined by the Public Prosecutor. During this examination, Thornton is asked if he confirms Gussev's evidence, but he does not do so, except in certain comparatively unimportant particulars. Confronted with his deposition on the preliminary enquiry, he admits his statements, but says they are untrue, that he did not speak the truth, he was excited—he was not forced to make these statements, he made them voluntarily, no torture, no "third degree," but they were untrue.

Counsel for three Russians now cross-examines, as did Counsel for MacDonald and Counsel for Thornton. The latter calls his client to contradict, which he does, and is not shaken by the cross-examination of the Public Prosecutor. Another Defence Counsel for two Russians also cross-examines; and is followed by counsel for Monkhouse, another British Subject, he also calling one of his Clients to contradict. Having finished with this witness, the Court adjourns at 10 p. m.

On April 13, another accused who had pleaded Guilty, Sokolov, is called as a witness; much the same process is gone through and with the same apparent objects: MacDonald as a rule corroborates, Thornton contradicts.

An extraordinary occurrence took place on this day—MacDonald, contradicting certain statements formerly made by him, is asked by the Public Prosecutor: "Yesterday . . . you declared 'Yes, guilty.' Do you deny this today, or do you confirm that you are guilty?" MacDonald answers, "According to the testimony given by myself, I plead guilty; in actual fact, not guilty"; and again, "Yesterday, I pleaded guilty. . . . Today in accordance with what I have just said, not guilty." There is, however, no formal withdrawal of the plea; and the case proceeds without further reference to the change of plea.

Sokolof is cross-examined—but as sufficient has been said to show the practice of the Russian Court, I do not pursue the proceedings further until the end of the evidence on April 15 and the morning Session of April 16, when at 11 a. m., the Court adjourned till 7 p. m.

At this evening Session, the President asks "Has the Commission of Experts formulated its opinion?" The Commission produce their Minutes and they are read. Eight questions had been submitted to them and the Minutes give the Questions and the Answers of the Experts. These Questions and Answers bear upon physical matters and may be disregarded in the present Article. MacDonald is again called and by his own Counsel and asked questions, which in our practice would be considered immaterial, but seem to have been put with a view of minimizing the punishment. . . .

Then the Public Prosecutor addresses the Court. He first promises that soon "will be given distinctly, explicitly, clearly, definitely and categorically for the last time in this case, the qualification of all the various events that were the subject of examination during our judicial investigation, of the investigation that preceded it, the qualification of the sum total of those social and political facts which lie at the base of the present trial." Then he has much to say of "those enemies who are blinded by their class hatred, who are seized with feelings of class enmity and rage . . . who tried to exercise upon the trend of this trial of this case moral pressure that revealed that frequently anti-Soviet circles, convulsed in hysterics, lose their necessary and highly extolled coolness and step over the boundaries of what is permissible . . ." He particularizes "the cries and hysteria of certain circles in England"; he quotes Comrade Stalin; he assails Mr. Patrick for his remarks in the House of Commons; he is proud that "The Soviet Court is the Court of the Soviet State, the court of the working classes," while "in contrast to this court, the court in all capitalist countries always was and has remained a court that realizes and protects the interests of the capitalist classes, the classes that exploit and oppress human labour." Other Members of the House of Commons are quoted and rebuked, the President of the Board of Trade amongst them. This kind of speech goes on for some seventeen pages, before the matters to be decided are touched upon. Then the address takes up the charges in the Indictment, but also has something to say about the laws of some other countries for "such, Citizen Thornton, are laws that exist in your country, which protect secrets of military State importance."

The Session continues till 11:45, when the Court rises till the morning. In the morning at 11:15 a. m., the Court resumes its Session, and the Public Prosecutor his speech. He now confines his remarks largely to the facts he considers proved: one of the accused "himself fairly characterized himself as a sharply defined completely formed type of counter-revolutionary spy

and wrecker"; another pleaded "guilty, but for us his confession is not enough"; the story of a third is "Nonsense. 'Child's prattle.'"; of a fourth, "a second-rate type of wrecker and spy . . . not a clean-handed type," the "moral instability is repugnant"; another "is the scum of our social life, the dregs of our social life"; an Englishmen was an exposed spy, "but . . . a little worm-eaten spy"; the woman wanted "Dances, evening parties, rendezvous, visits, face powder, perfumes, face cream, &c," and went "joy riding . . . in an English automobile among those comforts of life" and so "forgot you were a Soviet citizen," &c., &c.

At the next Session, Counsel for the accused have their say—those for the Russians pleading for clemency and generally throwing the blame on the British. Says one of them, "And so while we here in this hall are hearing the case of their citizens, over there in old England, as we know from the newspapers, prayers are being raised to heaven to the accompaniment of Easter chimes for Thornton and Monkhouse who are almost canonized as saints." MacDonald's confession is urged as a reason for clemency to him. Thornton's innocence is boldly asserted by his Counsel: the plea of "another comrade of the Defence" who "led three of his clients by the hand as if they were schoolgirls into Thornton's warm embrace" is "an extremely naive approach towards his clients." As to the evidence of those called, "as a general rule an accused man in Court always deviates from the truth" (he does not mean his own client, of course). Counsel for the other English take a similar line, and Counsel for two Russians, one the lady, recognize that "Thornton is not Faust and that the Russian engineers are not Marguerites."

All the Defence Counsel having been heard, the President calls for the final plea. Those who pleaded guilty, as well as those who had not, are given an opportunity to make a final plea. The British reassert their innocence, except MacDonald; the Russians and MacDonald admit guilt and are sorry for it. The lady says she "never sold myself to anybody. Anna Sergeyevna Kutuzova cannot be bought. Everybody knows this, and nobody has even tried to do it, least of all for face powder and face cream, a fact which Citizen the Public Prosecutor of the Supreme Court erroneously attributed to me yesterday. Even when I was in State service, I had perfumes and powders, and I do not intend in the future to give up these accessories of life." Moreover she before entering into the State's employ "also rode in an upholstered seat, not in a Buick but in a Packard." (Somehow I, *moi qui parle*, admire that girl.) The Court adjourned to consider the verdict.

On reassembling, the verdict is given. The name of each accused, age, education, &c. &c. are recited, and all but one Englishman found guilty. One Russian being found guilty of only a trivial offence is not punished. Three Russians are sentenced to ten years' deprivation of liberty, with loss of rights for five years and confiscation of all their property; three to eight year's deprivation of liberty, with the aforesaid consequences; one to five years but without confiscation, and another to two years' deprivation of liberty without confiscation or loss of rights; another to three years' deprivation without loss of rights or confiscation of property; the lady to eighteen months' deprivation of liberty without more.

Of the British Subjects, one is acquitted; three are ordered to leave the country within three days, not to return for five years; Thornton is sentenced to three years' loss of liberty, and MacDonald to two.

It is to be observed that the Court is addressed as "Comrade Judges." Counsel address each other as "Comrade," and the accused are not interfered with in using the same terminology.

Whatever the actual fact may be, there can be no doubt that the Court was perfectly justified in coming to the conclusion arrived at upon the evidence adduced; and it cannot be said that the sentences were unduly severe. I think most lawyers will agree with me that this trial is interesting in showing the different methods pursued in different countries to determine whether a named person is guilty of a named offence against the State.

Osgoode Hall, Toronto, October 27, 1933.

Explaining the Lawyer to the Layman

PUBLICITY for the legal profession, directed to the layman, is the idea behind a series of articles inaugurated by the *Daily Record* of Omaha, Neb., and now appearing in "court and commercial" newspapers throughout the United States. The articles are brief and readable and each one illustrates some service which the lawyer is specially capable of rendering to the layman. A compilation of articles already published in an attractive pamphlet form contains such suggestive titles as "The Counselor," "Lawyer alias Clergyman," "NIRA'S Interpreter and Your Representative," "We Live in An Age of Specialists," "Lawyers Are Repositories of National Trusts," "Unnecessary Expense?" "The Legal Profession Dominates Public Life," etc.

Syndication of these popular expositions of the advantages of availing oneself of the lawyer's services on proper occasions came as a result of the action of the "Associated Court and Commercial Newspapers" at its convention at Indianapolis on Sept. 21. The articles were presented to that body and it was then and there decided that the members of the Association would begin publication of them.

The pamphlet compilation of articles already published is entitled "Influence of the Legal Profession in the Community." It contains an introduction in which the editor of the *Daily Record* gives the genesis of the idea.

"Economic Adjustment of Bar to Modern Social Needs"

THE meeting of the Association of American Law Schools will be held at the Hotel Stevens, Chicago, on Thursday, Friday, and Saturday, December 28, 29, and 30. It is expected that on the program will be items of peculiar interest to the bar as a whole. On the first day it is planned to hold a symposium on the subject of "The Economic Adjustment of the Bar to Modern Social Needs," with very possibly a majority of the speakers being practicing lawyers; and on the same evening a Round Table will be conducted under the auspices of the Committee on Cooperation with the Bar. At the annual dinner on the second day the speakers will include President Robert M. Hutchins of the University of Chicago. On the third day a symposium will be held on "Trends in Modern Jurisprudence," with discussion by distinguished authorities on some of the newer American and foreign movements in Jurisprudence. Round Tables on special subjects will be held throughout the meeting.

AMERICAN BAR ASSOCIATION JOVRNAL

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JOSEPH R. TAYLOR
MANAGING EDITOR
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Chicago, Illinois

THE RESTATEMENT OF AGENCY AND BETTER LEGAL METHODS

The American Law Institute's Restatement of Agency is before us. The two volumes are filled with clear, concise and chiseled statements of the general law on the subject. Variations from these statements will of course be found in the law of some States—but these will be much less numerous than is perhaps generally imagined. The Annotations for each State will take care of those.

With this Restatement of Agency and the Annotations for his State the practitioner will have all the law he needs for the solution of his particular legal problem in agency. What is more, he has it in the form best adapted to a scientific and logical solution. He is enabled at the outset to test it in the light of the undoubted legal principle. His first and main task is not to begin an exhaustive search through digests and individual cases but to sift out his governing facts and apply the governing principle to them.

This is not an abrogation of precedent or of the method which the Bar now follows as a rule. It is a simplification of that method. The long and, at times, almost endless search through the decisions is merely the effort of the intelligent lawyer to extract the governing principle from "myriads of single instances." In the case of the less intelligent, it is no doubt a search for a case with a factual set-up closely resembling the case in hand. But the latter attempt hardly deserves the name of legal investigation and the former is now rendered unnecessary by the clear statement of all the general principles on the subject recognized by, or deducible from, judicial decisions.

The Restatement not only simplifies and gives a more logical and scientific character to the lawyer's task of solving his problem. It makes presentation of that solution to the courts in brief and oral argument much easier and more convincing. Courts are already beginning to quote the Restatements of the Institute in support of their decisions. The more authoritative they become, the more unnecessary will the present verbose technique in brief and judicial opinions become. Thus another problem, and by no means a minor one in the administration of Justice, should be effectively dealt with by means of this new "tool of the profession."

The Restatement of Agency furnishes a striking illustration of the growth of this branch of the Common Law. It takes two volumes—about as much as the Restatement of Contracts. And yet when the late Mr. Mechem began his pioneering work in this field practically the whole subject of Agency, for the practicing lawyer at least, seemed to be summed up in the old maxim *"qui facit per alium facit per se."* It concerned itself almost exclusively with the responsibility of the principal. The problem was to find out how far he was liable for what his agent did and bring that liability home to him. Little, if anything, was heard about the responsibility of the agent himself.

Then Mr. Mechem started on his great adventure of which, it may be truly said, a large part of the present Restatement of Agency is the final vindication. From many cognate subjects and decisions in the body of the law he gathered together material. He criticised, analyzed, distinguished and analogyzed. When his authoritative work appeared the greater part of the profession was no doubt surprised at the plenitude of the material and the importance of the subject. It had grown according to the familiar processes of the Common Law, but it took the hand of a legal genius to give it form and consistency and to make that growth intelligible to the profession.

Mr. Mechem's great work on the present Restatement of Agency was carried on

capably and thoroughly by one who had been his principal adviser from the beginning—Prof. Seavey of Harvard University. Under his leadership as Reporter the remaining parts of the subject (Chapters 6 to 14 inclusive) were drafted and published in tentative form and the revision of the entire Restatement was completed.

Publication of the Restatement of Contracts last year was hailed as proof that the results of the Institute's labors for ten years were finally to be made available to the profession. The publication of the Restatement of Agency is evidence that the schedule, as heretofore announced, can be carried out and that from now on each year will see another important part of the Common Law added to the list. It should be in every lawyer's library.

AN IMPORTANT RECENT DECISION

A case of peculiar interest at this time was recently decided by the Supreme Court of Missouri. It is entitled "In the Matter of Proceedings Against Paul Richards" and was a disbarment proceeding against one Richards, instituted by the Bar Association of St. Louis and the Missouri Bar Association. (63 S. W. Rep. 2nd Ser., 672.)

Respondent was charged with acts of malpractice unconnected with any proceeding pending in the Supreme Court. He challenged the jurisdiction of the Court on the ground that the court had "no original jurisdiction in disbarment proceedings." He also asserted that there was no inherent power of courts to admit and disbar attorneys, on the theory that in the distribution of State governmental power executive and judicial departments are invested by grant, whereas, by limitations placed on the legislative department the people reserve certain power to themselves, so that all governmental power not thus expressly granted or reserved is vested in the legislature. From this it was argued that if the power to create and regulate a bar is not granted to the judicial department or reserved to the people by limitation on the legislative department it is vested in the legislature, and that all judicial power, being granted power, is derivative and cannot be inherent.

The Court, conceding that it is not always easy to determine what objects naturally fall within the range of a particular department of government, said that in the light of judicial history courts cannot long continue properly to function in the administration of justice without power to admit and disbar attorneys, who from time immemorial have in a peculiar sense been regarded as their officers. From this the Court concludes that the above power naturally belongs to the judicial department if it is not expressly lodged elsewhere in the constitution. It says:

> "In a very practical sense this power (to control and discipline its officers), whether deemed inherent or implied, naturally belongs to each department of government and to each 'separate magistracy' to which the power expressly delegated is confided. The term 'inherent' is aptly descriptive of the identical power that was exercised by like agencies long before written constitutions were adopted, and inasmuch as the power still persists in full vigor in each of the three great branches of government its historical designation will hardly be abandoned, though for the purposes of this discussion the choice of adjectives is unimportant."

Courts have sometimes designated this widely recognized power of theirs to admit, disbar and otherwise discipline members of the bar, as inherent, without precisely defining the term. If at the time of and long before the adoption of our American constitutions that power was deemed to inhere in the judicial office, and if on that ground it is held that a State constitution granting to the judicial department all judicial power necessarily carries with it this power to admit and disbar attorneys, it would seem that the term "inherent" as applied to this power may in a sense be historically appropriate and not inconsistent with the view that the power was also a power included in the words of the constitutional grant.

THE NEW PROVIDENCE COUNTY COURT HOUSE

A rare combination of architectural beauty and dignity, historical appropriateness, and modern convenience is presented by the recently completed Providence County Court House in the city of Providence, Rhode Island. We are in receipt of a beautifully illustrated brochure in which various views of this structure are given, and in which the steps in the realization of the great project are set forth in broad outline.

The original commission, as well as the one which followed it and which saw the completion of the undertaking, did not set out to build merely a court house. It was to be something which would carry an aura of history as well as a proof of progress. It was to join the past and the present and provide for the needs of the future. It was to be a worthy embodiment of the idea of Justice. It is only when such ideas as these permeate the thoughts of those who build and execute that great buildings are created. Others are merely utilitarian piles of brick and stone and steel.

REVIEW OF RECENT SUPREME COURT DECISIONS

Evidence Erroneously Admitted as Dying Declaration May Not Be Sustained on Appeal for Narrower Purpose of Rebutting Certain Testimony—Sufficiency of Affidavit to Support Warrant of Search and Seizure for Violation of Tariff Act—Just Compensation for Taking of Property by Eminent Domain Includes Interest from Time of Taking—Ancillary Proceeding Against State Is Suit within Provisions of Eleventh Amendment—False Representations Made to Obtain Surety Bond Held to Preclude Discharge in Bankruptcy—Property Subject to State Tax on Termination of Interstate Shipment—Court of Claims not Established under Article III of Constitution and Compensation of Its Judges May Be Diminished during Term of Office

By Edgar Bronson Tolman*

Criminal Law—Evidence—Dying Declarations

Testimony is not admissible as a dying declaration unless the declarant spoke without hope of recovery and in the shadow of impending death.

Evidence offered, and erroneously received, as a dying declaration for the broad purpose of showing that the defendant committed murder may not be sustained on appeal for the narrower purpose of rebutting testimony for the defendant, to the effect that the victim was bent on suicide.

The victim's statement that she had been poisoned by the defendant is not admissible as evidence of a state of mind to rebut testimony for the defendant that the victim was bent on suicide, where such statement did not relate to the declarant's state of mind at the time of utterance, but to the past act of someone other than the declarant.

Shepard v. United States, Adv. Op. 6; 54 Sup. Ct. Rep. 22.

The petitioner, Charles A. Shepard, a major in the medical corps, was convicted of the murder of his wife. Upon the verdict of a jury, who had qualified their verdict by adding "without capital punishment," he was sentenced to life imprisonment. The Circuit Court of Appeals affirmed the judgment, one judge dissenting. On certiorari, the judgment was reversed by the Supreme Court, in an opinion by Mr. Justice Cardozo, on the ground that certain hearsay uttered by the victim was improperly admitted in evidence at the trial.

The murder was alleged to have been committed by poisoning the victim with bichloride of mercury. There was circumstantial evidence tending to show that the petitioner was in love with another woman and that the petitioner resorted to murder in order to be free to marry her.

The evidence challenged was offered by the Government in rebuttal near the end of the trial. On May 22, 1929, in a conversation between Mrs. Shepard, who was ill in bed, and her nurse the patient asked the nurse to get a certain bottle of whiskey. She then identified the bottle as one from which she had taken liquor just before collapsing, and asked if enough remained to make a test for poison, insisting that its taste and smell were strange. She then added "Dr. Shepard has poisoned me."

The Government first proved the conversation, and being doubtful of its competence, asked that it be stricken out. Later it proved it again, after the nurse had testified as to the victim's prospect of recovery, saying "she said she was not going to get well; she was going to die."

So far as the competence of the evidence rested upon its character as a dying declaration, the Court held it inadmissible. In this connection Mr. Justice Cardozo examined the evidence as to the circumstances surrounding the statement and concluded that it was not uttered "without hope of recovery and in the shadow of impending death."

> We have said that the declarant was not shown to have spoken without hope of recovery and in the shadow of impending death. Her illness began on May 20. She was found in a state of collapse, delirious, in pain, the pupils of her eyes dilated, and the retina suffused with blood. The conversation with the nurse occurred two days later. At that time her mind had cleared up, and her speech was rational and orderly. There was as yet no thought by any of her physicians that she was dangerously ill, still less that her case was hopeless. To all seeming she had greatly improved, and was moving forward to recovery. There had been no diagnosis of poison as the cause of her distress. Not till about a week afterwards was there a relapse, accompanied by an infection of the mouth, renewed congestion of the eyes, and later hemorrhages of the bowels. Death followed on June 15.
>
> Nothing in the condition of the patient on May 22 gives fair support to the conclusion that hope had then been lost. She may have thought she was going to die and have said so to her nurse, but this was consistent with hope, which could not have been put aside without more to quench it. Indeed, a fortnight later, she said to one of her physicians, though her condition was then grave, "You will get me well, won't you?" Fear or even belief that illness will end in death will not avail of itself to make a dying declaration. There must be "a settled, hopeless expectation." . . . that death is near at hand, and what is said must have been spoken in the hush of its impending presence. . . . Despair of recovery may indeed be gathered from the circumstances if the facts support the inference. . . . There is no unyielding ritual of words to be spoken by the dying. Despair may even be gathered though the period of survival outruns the bounds of expectation. . . . What is decisive is the state of mind. Even so, the state of mind must be exhibited in the evidence, and not left to conjecture. The patient must have spoken with the consciousness of a swift and certain doom.

The petitioner also urged further that the statement was but the declarant's conjecture, rather than a statement which could have been based on the victim's knowledge. But the question was left open, since the evidence had been ruled out by the Circuit Court of Appeals for failure to meet the test of a dying declaration.

The Circuit Court of Appeals determined, however, that the testimony was admissible to rebut testimony for the defendant, that Mrs. Shepard was bent upon

*Assisted by James L. Homire.

suicide. The theory advanced in support of this was that the statement of Mrs. Shepard was admissible, not as evidence of the truth of what was said, but as showing a state of mind inconsistent with the presence of suicidal intent.

But the Court declared that, since the evidence was offered for the broader purpose, as a dying declaration, which counsel for the Government conceded, it would be prejudicial to the defendant to sustain it on the narrower ground suggested. As to this MR. JUSTICE CARDOZO said:

> Beyond question the jury considered it for the broader purpose, as the court intended that they should. A different situation would be here if we could fairly say in the light of the whole record that the purpose had been left at large, without identifying token. There would then be room for argument that demand should have been made for an explanatory ruling. Here the course of the trial put the defendant off his guard. The testimony was received by the trial judge and offered by the Government with the plain understanding that it was to be used for an illegitimate purpose, gravely prejudicial. A trial becomes unfair if testimony thus accepted may be used in an appellate court as though admitted for a different purpose, unavowed and unsuspected. . . . Such at all events is the result when the purpose in reserve is so obscure and artificial that it would be unlikely to occur to the minds of uninstructed jurors, and even if it did, would be swallowed up and lost in the one that was disclosed.

The Court also considered the theory that the statement was admissible as evidence of a state of mind, to rebut testimony for the defendant that Mrs. Shepard had exhibited a weariness of life and a readiness to end it. Conceding that evidence of a state of mind might be admissible to rebut the proof as to suicide, the Court pointed out that the statement constituted no such evidence. In regard to this MR. JUSTICE CARDOZO said:

> The defendant would have no grievance if the testimony in rebuttal had been narrowed to that point. What the Government put in evidence, however, was something very different. It did not use the declarations by Mrs. Shepard to prove her present thoughts and feelings, or even her thoughts and feelings in times past. It used the declarations as proof of an act committed by some one else, as evidence that she was dying of poison given by her husband. This fact, if fact it was, the Government was free to prove, but not by hearsay declarations. It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to some one else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.

After reviewing cases dealing with contemporaneous declarations as proof of feeling or intent, MR. JUSTICE CARDOZO concluded his opinion as follows:

> The testimony now questioned faced backward and not forward. This at least it did in its most obvious implications. What is even more important, it spoke to a past act, and more than that, to an act by some one not the speaker. Other tendency, if it had any, was a filament too fine to be disentangled by a jury.

Messrs. Henry W. Colmery and Charles L. Kagey argued the cause for petitioner and Solicitor General Biggs for respondent.

Criminal Law—Search and Seizure—Sufficiency of Affidavit to Support Warrant

A warrant to search a private dwelling for seizure of property deposited therein in violation of the Tariff Act is not lawfully issued under the Fourth Amendment, where the affidavit on which the warrant issues states mere suspicion and belief, without supporting facts and circumstances.

Nathanson v. United States. Adv. Op. 4; 54 Sup. Ct. Rep. 11.

This case involved a question as to the sufficiency of a search warrant under which search of a private dwelling was made. The warrant, issued by a State judge, recited that Francis B. Laughlin had stated on oath "that he has come to suspect and does believe that certain merchandise, to wit: Certain liquors of foreign origin a more particular description of which cannot be given, upon which the duties have not been paid or which has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited" at a described dwelling. Aside from the affirmation of suspicion and belief, there were no facts or circumstances stated in support of the search warrant.

Upon a trial on an information charging smuggling under The Tariff Act the petitioner duly objected to the admission, as evidence, of certain liquors seized under color of the warrant; but his objection was overruled. Conviction followed in the trial court, and the Circuit Court of Appeals affirmed the judgment. On certiorari judgment was reversed in the Supreme Court, MR. JUSTICE MCREYNOLDS delivering the opinion.

In this opinion he pointed out that the Circuit Court of Appeals, recognizing that a search warrant so issued would be invalid under the Prohibition Act, had distinguished the case by reason of the fact that it relates to a charge of violation of the Tariff Act. The Supreme Court, however, found in this distinction nothing to give validity to the warrant, despite differences in the two statutes, since the petitioner's objection to the warrant was based on the Fourth Amendment. Pointing out that that Amendment prohibits absolutely all unreasonable searches and seizures, the Court held the affidavit, stating mere suspicion or belief, insufficient to support a warrant to search a private dwelling. As to this the Court said:

> Here, we are dealing with a warrant to search a private dwelling said to have been authorized by the Tariff Act. It went upon a mere affirmation of suspicion and belief without any statement of adequate supporting facts.
>
> All unreasonable searches and seizures are absolutely forbidden by the Fourth Amendment. In some circumstances a public officer may make a lawful seizure without a warrant; in others he may act only under permission of one. In the present case the place of search and seizure was a private dwelling. The challenged warrant is said to constitute adequate authority therefor. The legality of the seizure depends upon its sufficiency. Did it issue upon probable cause supported by oath or affirmation within the intendment of the Amendment?
>
> The Amendment applies to warrants under any statute; revenue, tariff, and all others. No warrant inhibited by it can be made effective by an act of Congress or otherwise.
>
> It is argued that searches for goods smuggled into the United States in fraud of the revenue, based upon affidavits of suspicion or belief, have been sustained from the earliest times; that this practice was authorized by the Revenue Act of July 31, 1789, 1 Stat. 43, also subsequent like enactments. But we think nothing in these statutes indicates that a warrant to search a private dwelling may rest upon mere affirmance of suspicion or belief without disclosure of supporting facts or circumstances.
>
> Although relied upon, we find nothing in Locke v. United States and Boyd v. United States which upholds the view of the Circuit Court of Appeals. The first of these causes was a proceeding to forfeit a cargo of imported goods seized for violation of the revenue laws. It presented no question concerning the validity of a warrant. The second denied the right to compel production of private papers in a suit by the United States to establish a forfeiture of goods fraudulently imported.
>
> Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he

can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough.

Mr. Frederick M. P. Pearse argued the cause for petitioner and Assistant Solicitor General MacLean for respondent.

Eminent Domain—Elements of Just Compensation for Property Taken for Public Use

In suits to recover compensation for property taken by the United States for public use, the right to just compensation rests on the Fifth Amendment, and no statutory provision is necessary to entitle the property owner to interest, when interest or its equivalent is a part of just compensation. The owner is not limited to the value of the property at the time of the taking, but is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking.

Jacobs et al v. United States, Adv. Op. 37; 54 Sup. Ct. Rep. 26.

In this case the Court reaffirmed and applied the principle that just compensation for the taking of property by eminent domain includes interest from the time of the taking. The property in question, farm lands owned by the petitioners, was subjected to a servitude of intermittent overflows by reason of the construction of Widow's Bar Dam across Jones Creek, in Jackson County, Alabama. The petitioners brought suits for compensation under the Tucker Act. The District Court allowed interest from the time of the taking as part of just compensation guaranteed by the Fifth Amendment. The Circuit Court of Appeals held the interest not recoverable, upon the ground that the suits were not condemnation proceedings instituted by the Government, but were founded upon an implied contract which did not entitle the petitioners to interest.

On certiorari, this was reversed in an opinion by the CHIEF JUSTICE. Pointing out that the right of the petitioners rested on a duty imposed by the Fifth Amendment, and that no specific command to pay interest is necessary when interest is a part of just compensation, MR. CHIEF JUSTICE HUGHES said:

> The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States. 28 U. S. C. 41 (20).
>
> The amount recoverable was just compensation, not inadequate compensation. The concept of just compensation is comprehensive and includes all elements, "and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation." The owner is not limited to the value of the property at the time of the taking; "he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking." Interest at a proper rate "is a good measure by which to ascertain the amount so to be added." *Seaboard Air Line R. Co. v. United States,* 261 U. S. 299, 306. That suit was brought by the owner under section 10 of the Lever Act, which, in authorizing the President to requisition property for public use and to pay just compensation, said nothing as to interest. But the Court held that the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such an allowance was appropriate in order to make the compensation adequate.

United States v. North American Company, 253 U. S. 330, was distinguished upon the ground that there the original taking was tortious, and created no liability on the Government. Subsequent action there taken was held to create a liability resting on an implied contract.

Mr. Charles C. Moore argued the cause for petitioners and Solicitor General Biggs for respondent.

Federal Courts—Suits Against States—Scope of Eleventh Amendment

Under the Eleventh Amendment an ancillary proceeding against a State is a suit within the provisions of that Amendment prohibiting suits against States, and a Federal District Court has no jurisdiction to entertain an ancillary proceeding against the State to enjoin it from litigating in its probate court issues alleged to have been previously determined in the Federal District Court. The fact that the ancillary proceeding was brought to protect the jurisdiction of the Federal Court in the prior proceeding does not destroy the State's immunity from suit.

Missouri et al. v. Fiske et al., Adv. Op. 25; 54 Sup. Ct. Rep. 18.

The proceeding under review in this case arose on an ancillary and supplemental bill of complaint whereby the respondents sought to enjoin the State of Missouri from prosecuting probate proceedings in a State court in relation to the estate of Sophie Franz, deceased.

The decedent was the widow of Ehrhardt D. Franz, who died in 1898, leaving his property by will to his wife for life, with remainder to his ten children. In 1909 the widow transferred certain securities, in part belonging to her husband's estate, to trustees to hold during her life. Of such shares some had been increased by stock dividends; later these were exchanged for shares of a successor corporation, and these were further increased by stock dividends.

The original suit, to which the one under review was ancillary, was commenced in 1924, in a Federal District Court, by a son of Ehrhardt D. Franz to determine his remainder interest and to obtain an accounting and security for his protection. The bill was dismissed for lack of indispensable parties, but an amended bill was filed with other persons as additional parties. An injunction issued on an ancillary bill to enjoin Sophie Franz and her trustees from litigating the same issues in a state court. Later, a decree was entered in the Federal Court, which the Circuit Court of Appeals affirmed, with modification as to security and costs.

In reviewing the case the Supreme Court assumed that the said decree determined that certain shares, with the stock dividend increases, were not income belonging to Sophie Franz, but *corpus* of her husband's estate.

In 1930 Sophie Franz died, and in view of the decree of the Federal Court, her executor did not include the shares in question in the inventory of her estate. Thereupon, the State of Missouri procured a citation in the probate court to compel the executor to inventory the shares as assets of Sophie Franz's estate. The State, on motion, was granted leave to intervene in the Federal Court. In the latter court the State alleged that certain of the remaindermen had extinguished their remainders by assignment to their mother, and that the stock in question should have been inventoried as part of her estate. It prayed that a portion of the stock be transferred to the registry of the Federal Court and held pending the decision of the probate court. The respondents answered denying that the prior decree of the Federal Court was limited as alleged by the State,

and they set up their rights under that decree as *res judicata*. They prayed for dismissal of the State's petition.

Shortly before answering, however, the respondents brought the ancillary and supplemental complaint to enjoin the State from prosecuting the citation in the Probate Court until further direction of the district court. The District Court dismissed the ancillary bill for want of jurisdiction, holding that the suit could not be maintained against the State without its consent, under the Eleventh Amendment. The Circuit Court of Appeals reversed the decree, entertaining the view that the District Court could exercise jurisdiction "for the protection of the jurisdiction and decrees of the trial court." On certiorari, this was reversed by the Supreme Court in an opinion by the CHIEF JUSTICE.

In deciding the case, the Supreme Court expressed its agreement with the Circuit Court that the State had not waived such immunity from suit as the Eleventh Amendment confers.

The scope of that immunity was then considered, and the conclusion reached that there is no limitation on the Eleventh Amendment rendering it inapplicable to a suit to protect the jurisdiction of the Federal Court or to a proceeding *in rem* or *quasi in rem*. Respecting these points MR. CHIEF JUSTICE HUGHES said:

> The Eleventh Amendment is an explicit limitation of the judicial power of the United States. "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State." However important that power, it cannot extend into the forbidden sphere. Considerations of convenience open no avenue of escape from the restriction.
>
> This is not less a suit against the State because the bill is ancillary and supplemental. The State had not been a party to the litigation which resulted in the decree upon which respondents rely. The State has not come into the suit for the purpose of litigating the rights asserted. Respondents are attempting to subject the State, without its consent, to the court's process.
>
> The question, then, is whether the purpose to protect the jurisdiction of the Federal Court, and to maintain its decree against the proceeding of the State in the State Court, removes the suit from the application of the Eleventh Amendment. No warrant is found for such a limitation of its terms. The exercise of the judicial power cannot be protected by judicial action which the constitution specifically provides is beyond the judicial power. Thus, when it appears that a State is an indispensable party to enable a federal court to grant relief sought by private parties, and the State has not consented to be sued, the court will refuse to take jurisdiction. . . . And if a State, unless it consents, cannot be brought into a suit by original bill, to enable a federal court to acquire jurisdiction, no basis appears for the contention that a State in the absence of consent may be sued by means of an ancillary and supplemental bill in order to enforce a decree.
>
> The fact that a suit in a federal court is in rem, or quasi in rem, furnishes no ground for the issue of process against a non-consenting State. If the State chooses to come into the court as plaintiff, or to intervene, seeking the enforcement of liens or claims, the State may be permitted to do so, and in that event its rights will receive the same consideration as those of other parties in interest. But when the State does not come in and withholds its consent, the court has no authority to issue process against the State to compel it to subject itself to the court's judgment, whatever the nature of the suit.

In conclusion, it is pointed out in the opinion that if the decree determining the rights of the remaindermen is binding on the State, the Federal right thereunder can be set up in the State Court, subject to review by the Federal Supreme Court by appropriate procedure.

Mr. G. A. Buder Jr. argued the cause for respondents.

Bankruptcy—Discharge—False Pretenses to Procure Surety Bond Preclude Discharge

A bankrupt who has obtained a surety bond by the use of materially false statements in writing, respecting his financial condition, is not entitled to a discharge in bankruptcy under the Bankruptcy Act, Section 14 as amended, 11 U. S. C., Section 32 (b) (3), requiring the denial of discharge if the bankrupt "obtained money or property on credit....by making....a materially false statement in writing respecting his financial condition."

Fidelity & Deposit Co. of Maryland v. Arens, Adv. Op. 12; 54 Sup. Ct. Rep. 16.

In order to procure a contract for highway construction the respondent induced the petitioner to furnish a surety bond conditioned on respondent's paying for the labor and material for the work. To induce the petitioner to give the bond the respondent made materially false written statements as to his financial condition. He failed and the petitioner paid a judgment of $10,000 against principal and surety. After the respondent's adjudication of bankruptcy, he applied for discharge, which was granted over the petitioner's objections based on the false statements in writing. A decree of discharge followed which the Circuit Court of Appeals affirmed.

On certiorari this was reversed by the Supreme Court in an opinion by MR. JUSTICE BUTLER.

Rejecting the respondent's contention that the bond obtained was not "property" within the meaning of the pertinent provision, and construing that term broadly to carry out the intent of the Act, MR. JUSTICE BUTLER said:

> The Bankruptcy Act, Section 14 as amended, 11 U. S. C., Section 32 (b) (3), requires denial of discharge if the bankrupt "obtained money or property on credit . . . by making . . . a materially false statement in writing respecting his financial condition." Petitioner's obligation was given in behalf of respondent and inured to his benefit. It was a means by which he procured the contract and was security for the payment of his indebtedness incurred for labor or material required to do the work. But respondent insists that the bond is not property and that his fraud in obtaining it is not within the condemnation of clause (3). "Property" is a word of very broad meaning and when used without qualification, expressly made or plainly implied, it reasonably may be construed to include obligations, rights and other intangibles as well as physical things. . . . For the meaning rightly here to be given the word, regard is to be had to the statute and connection in which it is found. . . . The Act, while making discharge of bankrupts the general rule, conditions the grant upon adherence by every applicant to the standards of honesty and fair dealing in business transactions that are required or reflected in Section 32 (b) (1), (2), (3), (4), (6), (7). The fraud perpetrated by respondent is of the kind condemned. Giving effect to the rule that legislative intent controls, it is plain that "property" includes petitioner's obligation according to the terms of the bond to pay respondent's debts.

Likewise rejected was the point that the bond was not obtained on credit. As to this the Court said:

> It remains to be considered whether the respondent obtained petitioner's obligation "on credit." Principal and surety must be held to have had in contemplation all liabilities that naturally might arise from such a contract. Respondent was bound by agreement, implied by law if not expressly made, that he would make good to petitioner whatever the latter as such surety might be required to pay. Petitioner gave its obligation, not for the premium alone, but also in consideration of respondent's promise to

reimburse it. Having regard to the results that at the beginning the parties were reasonably bound to anticipate, it is clear that respondent obtained, and petitioner gave, the bond and obligation on credit. . . While clause (3) seems aimed particularly at false pretenses made by borrowers and purchasers to obtain money or goods on credit, . . . it is not limited to such transactions. Respondent's application for discharge should have been denied.

Mr. John Lichty argued the cause for petitioner.

State Taxation—Personal Property Tax—Property Subject to Tax on Termination of Interstate Shipment

Cattle shipped from outside a State and held in such State by their owner, on the tax date, for resale and further shipment, to points both within and without the State, are subject to a non-discriminatory personal property tax imposed by such State. The original shipment having ended and the property having come to rest in the State, there was no immunity from State taxation on the ground that the cattle were moving in interstate commerce, even though ordinarily the owner in fact ships most of cattle bought by him into other States.

Minnesota v. Blasius, Adv. Op. 19; 54 Sup. Ct. Rep. 34.

The opinion in this case, delivered by the CHIEF JUSTICE, dealt with the power of Minnesota to tax certain cattle as the personal property of the respondent, Blasius. The respondent's contention, that the cattle were immune from the tax, was made upon the theory that the cattle were in course of interstate commerce, which the State is powerless to tax. In a suit to recover the tax the Supreme Court of Minnesota, reversing the trial court, sustained the defense interposed by Blaisius. On certiorari this was reversed.

The trial court found, among other facts, that the tax is non-discriminatory, that the practice of Blasius was to purchase cattle, bring them to stockyards at St. Paul, and later sell and deliver them to others both within and without the State. Between purchase and shipment of the cattle, they were placed in pens leased by the respondent, and he paid for their feed and water. Most of the cattle purchased by him were sold and shipped to non-residents of the State. The cattle in question, 11 head, had been purchased outside and shipped into the State, and on April 30, 1929, they were owned by the respondent and had not been entered for shipment at any point. On May 1, 1929, the tax date, 7 were sold and shipped outside the State, and the remaining 4 sold and shipped the following date.

Holding that the cattle were subject to the tax, MR. CHIEF JUSTICE HUGHES first observed that the course of dealing described is so related to interstate commerce as to subject it to the regulatory power of Congress, within the reach of the Anti-Trust Act of July 2, 1890. He added, however, that it did not necessarily follow from the existence of a flow of interstate commerce, subject to the regulatory power of Congress, that a State tax on property at rest in the State was invalid. As to this the Court said:

> But because there is a flow of interstate commerce which is subject to the regulating power of the Congress, it does not necessarily follow that, in the absence of a conflict with the exercise of that power, a State may not lay a non-discriminatory tax upon property which, although connected with that flow as a general course of business, has come to rest and has acquired a situs within the State. The distinction was recognized in *Stafford v. Wallace*, 258 U. S. 495 pp. 525, 526, where the Court cited, as an illustration, the case of *Bacon v. Illinois*, 227 U. S. 504, in which such a non-discriminatory property tax was sustained. And the Court in the *Stafford case* quoted from the opinion in the *Bacon case* (supra, p. 516) the following statement of the distinction: "The question" (that is, as to the validity of the state tax) "it should be observed, is not with respect to the extent of the power of Congress to regulate interstate commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority."
>
> The States may not impose direct burdens upon interstate commerce, that is, they may not regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains. This limitation applies to the exertion of the State's taxing power as well as to any other interference by the State with the essential freedom of interstate commerce. Thus, the State cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it. Similarly, the States may not tax property in transit in interstate commerce. But, by reason of a break in the transit, the property may come to rest within a State and become subject to the power of the State to impose a non-discriminatory property tax. Such an exertion of state power belongs to that class of cases in which, by virtue of the nature and importance of local concerns, the State may act until Congress, if it has paramount authority over the subject, substitutes its own regulation. The "crucial question," in determining whether the State's taxing power may thus be exerted, is that of "continuity of transit." . .
>
> If the interstate movement has not begun, the mere fact that such a movement is contemplated does not withdraw the property from the State's power to tax it. . . If the interstate movement has begun, it may be regarded as continuing, so as to maintain the immunity of the property from state taxation, despite temporary interruptions due to the necessities of the journey or for the purpose of safety and convenience in the course of the movement.

In conclusion, the significant facts showing that the property was at rest in Minnesota were summarized:

> Here the original shipment was not suspended; it was ended. That shipment was to the South St. Paul stockyards for sale on that market. That transportation had ceased, and the cattle were sold on that market to Blasius, who became absolute owner and was free to deal with them as he liked. He could sell the cattle within the State or for shipment outside the State. He placed them in pens and cared for them awaiting such disposition as he might see fit to make for his own profit. The tax was assessed on the regular tax day while Blasius thus owned and possessed them. The cattle were not held by him for the purpose of promoting their safe or convenient transit. They were not in transit. Their situs was in Minnesota where they had come to rest. There was no federal right to immunity from the tax.

Mr. Harry L. Peterson, Attorney General of Minn., and Mr. Harold E. Stassen argued the cause for petitioner and Mr. D. L. Grannis for respondent.

Constitutional Law—Judiciary—Compensation of Judges

The Supreme Court and the Court of Appeals of the District of Columbia are constitutional courts of the United States, ordained and established under Article III of the Constitution, and the compensation of their judges cannot, under the Constitution, be diminished during their continuance in office.

The Court of Claims is not established under Article III, however, but derives its powers from Congress acting under other constitutional provisions, and the compensation of judges of that Court may be diminished, by Congress, during their continuance in office.

O'Donoghue v. United States, Adv. Op. 950; 53 Sup. Ct. Rep. 740.

Williams v. United States, Adv. Op. 965; 53 Sup. Ct. Rep. 751.

Two opinions, by MR. JUSTICE SUTHERLAND, in these cases dispose of questions relating to the status

of the Court of Claims and the courts of the District of Columbia in relation to Article III, Section 1, of the Constitution. It is there provided that:

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

In the cases relating to the status of the courts of the District of Columbia the question arose in a suit brought in the Court of Claims by an Associate Justice of the Supreme Court of the District and in a suit brought by an Associate Justice of the Court of Appeals of the District. Both suits were brought to recover the difference between the amounts of their respective salaries as fixed upon their entry into office and the amounts actually paid to them for certain periods subsequent to the effective date of the Legislative Appropriation Act of 1932, reducing certain salaries. The difference between the amounts paid and the amounts sued for were deducted by the disbursing officer of the Department of Justice, acting pursuant to a ruling of the Comptroller General to the effect that the courts in question were "legislative," rather than "constitutional" courts, and hence, the judges thereof are not within the protection of Article III, Section 1, of the Constitution. In so ruling the Comptroller General took the position that the salaries of the judges of the District of Columbia were not within the exception of Section 107 (a) (5), providing that

> "the salaries and retired pay of all judges (except judges whose compensation may not, under the Constitution, be diminished during their continuance in office), if such salaries or retired pay are at a rate exceeding $10,000 per annum, shall be at the rate of $10,000 per annum."

The plaintiffs, in seeking to recover, contended that they were within the exception of Section 107, because they are judges whose compensation may not, under the Constitution, be diminished during their continuance in office. The Government demurred to the petitions, and thereupon the Court of Claims certified to the Supreme Court the following questions:

> "Does Section 1, Article III, of the Constitution of the United States apply to the Supreme Court [and to the Court of Appeals] of the District of Columbia and forbid a reduction of the compensation of the Justices thereof during their continuance in office?"
>
> "II. Can the compensation of a Justice of the Supreme Court [or of the Court of Appeals] of the District of Columbia be lawfully diminished during his continuance in office?"

Answering the first question in the affirmative and the second in the negative, MR. JUSTICE SUTHERLAND first pointed out that the question involved did not relate to the constitutionality of the act, but solely to the scope of the constitutional limitation, since Congress had specifically excepted from operation of the act all judges whose compensation may not be reduced under the Constitution.

A review of the underlying purpose of the constitutional provision was then had, emphasizing the fact that the Constitution distributes the powers of government into three separate departments—the legislative, the executive and judicial.

The necessity of insuring the independence of each branch, as a means of rendering the separation effective was then emphasized. As to this MR. JUSTICE SUTHERLAND said, in part:

> If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others—independent not in the sense that they shall not cooperate to the common end of carrying into effect the purposes of the Constitution, but in the sense that the acts of each shall never be controlled by, or subjected, directly or indirectly to, the coercive influence of either of the other departments. James Wilson, one of the framers of the Constitution and a justice of this court, in one of his law lectures said that the independence of each department required that its proceedings "should be free from the remotest influence, direct or indirect, of either of the other two powers." . . . And the importance of such independence was similarly recognized by Mr. Justice Story when he said that in reference to each other, neither of the departments "ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers." . . .
>
> The anxiety of the framers of the Constitution to preserve the independence especially of the judicial department is manifested by the provision now under review, forbidding the diminution of the compensation of the judges of courts exercising the judicial power of the United States. This requirement was foreshadowed, and its vital character attested, by the Declaration of Independence, which, among the injuries and usurpations recited against the King of Great Britain, declared that he had "made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."
>
> In framing the Constitution, therefore, the power to diminish the compensation of the federal judges was explicitly denied, in order, inter alia, that their judgment or action might never be swayed in the slightest degree by the temptation to cultivate the favor or avoid the displeasure of that department which, as master of the purse, would otherwise hold the power to reduce their means of support.

To further illustrate the importance of the independence of the judiciary MR. JUSTICE SUTHERLAND quoted the language of Chief Justice Marshall who, in the Virginia Convention of 1829-1830 said:

> "The Judicial Department comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? . . . I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent Judiciary."

After thus reviewing the policy which Article III Section 1 embodies, the settled law as to the status of territorial courts was recognized as beyond the scope thereof, by reason of Article IV, Section 3, Cl. 2 of the Constitution relating to the "territory or other property of the United States." The temporary nature of the territories was suggested in explanation of the fact that the status of judges of the territorial courts rests on a different basis.

Placed in contrast to this was the permanent character of the District of Columbia.

> How different are the status and characteristics of the District of Columbia! The pertinent clause of the Constitution (Art. 1, Section 8, cl. 17) confers the power on Congress to "exercise exclusive legislation . . . over such district . . . as may . . . become the seat of the government of the United States." These are words of permanent governmental power. The District, as the seat of the national government, is as lasting as the states from which it was carved or the union whose permanent capital it became. It could not have been intended otherwise; and it was thus recogized by the act of acceptance in 1790 (Sec. 1, c. 28, 1 Stat. 130): ". . . the (District) is hereby accepted for the permanent seat of the government of the United States."
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> In the District clause, unlike the territorial clause, there is no mere linking of the legislative processes to the disposal and regulation of the public domain—the landed estates of the sovereign—within which transitory governments to tide over the periods of pupilage may be constituted, but an unqualified grant of permanent legislative power over a selected area set apart for the enduring purposes of the general government, to which the administration of purely local affairs is obviously subordinate and

incidental. The District is not an "ephemeral" subdivision of the "outlying dominion of the United States," but the capital—the very heart—of the Union itself, to be maintained as the "permanent" abiding place of all its supreme departments, and within which the immense powers of the general government were destined to be exercised for the great and expanding population of forty-eight states, and for a future immeasurable beyond the prophetic vision of those who designed and created it.

In addition, it was pointed out that the District was made up of portions of two of the original States, and was not taken out of the Union by the cession. Its inhabitants were originally entitled to all the safeguards of the Constitution, who, in the view of the majority, were not deprived of such safeguards by the cession.

> We think it is not reasonable to assume that the cession stripped them of these rights, and that it was intended that at the very seat of the national government the people should be less fortified by the guaranty of an independent judiciary than in other parts of the Union.

After commenting on certain cases bearing on the question, MR. JUSTICE SUTHERLAND stated that the majority could find no basis for holding the District of Columbia courts incapable of receiving judicial power under Article III, and, further, that the existence of additional congressional power over them under Article I, Section 8, Paragraph 17, does not affect the question. As to this he said:

> In the light of all that has now been said, we are unable to perceive upon what basis of reason it can be said that these courts of the District are incapable of receiving the judicial power under Art. III. In respect of them we take the true rule to be that they are courts of the United States, vested generally with the same jurisdiction as that possessed by the inferior federal courts located elsewhere in respect of the cases enumerated in Section 2 of Art. III. The provision of this section of the article is that the "judicial power shall extend" to the cases enumerated, and it logically follows that where jurisdiction over these cases is conferred upon the courts of the District, the judicial power, since they are capable of receiving it, is, ipso facto, vested in such courts as inferior courts of the United States.
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> The fact that Congress, under another and plenary grant of power, has conferred upon these courts jurisdiction over non-federal causes of action, or over quasi-judicial or administrative matters, does not affect the question. In dealing with the District, Congress possesses the powers which belong to it in respect of territory within a state, and also the powers of a state. Keller v. Potomac Elec. Co., 261 U. S. 428, 442-443. "In other words," this court there said, "it possesses a dual authority over the District and may clothe the courts of the District not only with the jurisdiction and powers of federal courts in the several States but with such authority as a State may confer on her courts."
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> Since Congress, then, has the same power under Art. III of the Constitution to ordain and establish inferior federal courts in the District of Columbia as in the states, whether it has done so in any particular instance depends upon the same inquiry—Does the judicial power conferred extend to the cases enumerated in that article? If it does, the judicial power thus conferred is not and cannot be affected by the additional congressional legislation, enacted under Article I, Section 8, cl. 17, imposing upon such courts other duties, which, because that special power is limited to the District, Congress cannot impose upon inferior federal courts elsewhere. The two powers are not incompatible; and we perceive no reason for holding that the plenary power given by the District clause of the Constitution may be used to destroy the operative effect of the judicial clause within the District, where, unlike the territories occupying a different status, that clause is entirely appropriate and applicable.

The unbroken practice of Congress, consistent with the view taken, was also cited.

The majority opinion was concluded with the following statement.

> We hold that the Supreme Court and the Court of Appeals of the District of Columbia are constitutional courts of the United States, ordained and established under Art. III of the Constitution; that the judges of these courts hold their offices during good behavior, and that their compensation cannot, under the Constitution, be diminished during their continuance in office.

THE CHIEF JUSTICE, MR. JUSTICE VAN DEVANTER and MR. JUSTICE CARDOZO dissenting, said:

> We are of the opinion that the courts of the District of Columbia, as this court has repeatedly declared, are not courts established under section 1 of Article III of the Constitution, but are established under the broad authority conferred upon the Congress for the government of the District of Columbia by paragraph 17 of section 8 of Article I. Hence, the limitations imposed by section 1 of Article III, with respect to tenure and compensation, are not applicable to judges of these courts. The special authority conferred for the government of the District of Columbia necessarily includes the power to establish courts deemed to be appropriate for the District, . . . including the power to fix and alter tenure and compensation. It is a power complete in itself and derives nothing from section 1 of Article III. It is a power not less complete, but essentially the same as that which is conferred upon the Congress for the government of territories. . . . It is not a dual power in the sense that it is derived from two sources, that is, both from Article III and also from the constitutional provision for the government of the District, but is dual only in the sense that the latter provision confers an authority so broad that it enables the Congress to invest the courts of the District not only with jurisdiction and powers analogous to those of federal courts within the States but also with jurisdiction and powers analogous to those which States may vest in their own courts. As the courts of the District do not rest for their creation on section 1 of Article III, that creation is not subject to any of the limitations of that provision. Nor would those limitations, if considered to be applicable, be susceptible of division so that some might be deemed obligatory and others might be ignored. If the limitations relating to courts established under section 1 of Article III applied to the courts of the District of Columbia, they would necessarily prevent the attaching to the latter courts of jurisdiction and powers of an administrative sort. It is only because the Congress, in establishing the courts of the District of Columbia, is free from the limitations imposed by section 1 of Article III that administrative powers can be, and are, conferred upon them. . . .
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> With the question of policy, this court is not concerned, save as policy is determined by the Constitution. The question is one of constitutional interpretation which has hitherto been deemed to be settled.

As to the Court of Claims, however, (*Williams v. United States*), the Court unanimously held that the judges thereof were not within the protection of Article III, Section 1. While recognizing that many of the considerations referred to in the O'Donoghue case are persuasive as to the status of judges of the Court of Claims, nevertheless, other reasons were found controlling which led to a different conclusion from that reached in the case mentioned.

In dealing with status of the Court of Claims, its history was first outlined, showing that at first it was but an administrative or advisory body, whose decisions were not subject to review by the Supreme Court, since the latter has no appellate jurisdiction to review determinations of non-judicial bodies. In 1887, by the Tucker Act, the Court of Claims was converted into a court. Referring to the legislation working this change, MR. JUSTICE SUTHERLAND said:

> By these provisions it is made plain that the Court of Claims, originally nothing more than an administrative or advisory body, was converted into a court, in fact as well as in name, and given jurisdiction over controversies which were susceptible of judicial cognizance. It is only in that view that the appellant jurisdiction of this court in respect of the judgments of that court could be sustained, or concurrent jurisdiction appropriately be conferred upon the federal district courts. The Court of Claims, therefore, undoubtedly, in entertaining and deciding these controversies, exercises judicial power, but the question still

remains—and is the vital question—whether it is the judicial power defined by Art. III of the Constitution.

The view stated in *Ex parte Bakelite Corp.* 279 U. S. 438, which dealt specifically with the Court of Customs Appeals, that it is a legislative court, rather than a constitutional court, was adhered to, despite language to the contrary in certain other cases. The Court's conclusion as to this aspect of the case was thus expressed:

> Further reflection tends only to confirm the views expressed in the Bakelite opinion as to the status of the Court of Customs Appeals, and we feel bound to reaffirm and apply them. And, giving these views due effect here, we see no escape from the conclusion that if the Court of Customs Appeals is a legislative court, so also is the Court of Claims.

In the remaining portion of the opinion the question was considered in detail, whether the consent of the United States to be sued causes the judicial power of Article III to attach to the court exercising jurisdiction over the case, in virtue of the clause which extends the power to "controversies to which the United States shall be a party." The conclusion reached as to this was that "controversies to which the United States may by statute be made a party defendant, at least as a general rule, lie wholly outside the scope of the judicial power vested by Art. III in the constitutional courts."

> The view, therefore, that when congressional consent has been given to the maintenance of suits against the United States, it ipso facto becomes a matter of indifference whether the United States is a party plaintiff or defendant, because the judicial power as defined in Art. III immediately and automatically extends to such suits, must be rejected. It cannot be reconciled with the settled principle that where a controversy is of such a character as to require the exercise of the judicial power defined by Art. III, jurisdiction thereof can be conferred only on courts established in virtue of that article, and that Congress is without power to vest that judicial power in any other judicial tribunal, or, of course, in an executive officer, or administrative or executive board, since, to repeat the language of Chief Justice Marshall in The American Insurance Company et al. v. Canter, supra, "they are incapable of receiving it."
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> The view under discussion—that Congress having consented that the United States may be sued, the judicial power defined in Art. III at once attaches to the court authorized to hear and determine the suits—must, then, be jected, for the further reason, or, perhaps, what comes to the same reason differently stated, that it cannot be reconciled with the limitation fundamentally implicit in the constitutional separation of the powers, namely, that a power definitely assigned by the *Constitution* to one department can neither be surrendered nor delegated by that department, nor vested by statute in another department or agency. . . . And since Congress, whenever it thinks proper, undoubtedly may, without infringing the Constitution, confer upon an executive officer or administrative board, or an existing or specially constituted court, or retain for itself, the power to hear and determine controversies respecting claims against the United States, it follows indubitably that such power, in whatever guise or by whatever agency exercised, is no part of the judicial power vested in the constitutional courts by the third article. That is to say, a power which may be devolved at the will of Congress, upon any of the three departments plainly is not within the doctrine of the separation and independent exercise of governmental powers contemplated by the tripartite distribution of such powers.

Messrs. John W. Davis and John S. Flannery argued the cause for Daniel O'Donoghue and William Hitz and Solicitor General Thacher argued it for the United States.

DEPARTMENT OF CURRENT LEGISLATION

Federal Farm Credit Legislation

BY H. G. WOOD AND JOHN O'BRIEN

THE emergency session of the Seventy-third Congress made elaborate provision to take care of farm indebtedness and to provide for credit for the agricultural interests of the country. Reorganization of the Government agricultural credit facilities under a unified control, the reduction on interest in various ways, and the providing of credits which would permit the prevention of foreclosure on farms held by Federal agencies, were provided for with the aid of government money and government guarantees. The acts, however, contain provisions for the protection of the principal of the loans made with public money by limiting the loans to a percentage of the value of the property. The planners of the act, however, had a difficult situation to meet. They did not want to limit the advances to a percentage of the value of the present day, or depression value of the farms, so under one provision of the statute authorizing large loans of government money, the loan is required to be 50 per cent of the "normal" value of the property, which it is said will not be a "distress sale value" but will be based on "the productive value of the land over a period of years."[1] The normal value will obviously be very greatly in excess of the present sale value in most cases. The loans of government money are made indirectly through land banks or other agencies. Cooperative organizations of producers are used as a basis for loans for producing or marketing purposes. As a result the Federal government will not normally pass directly on the loans to individuals but will loan through another agency, having a certain responsibility so that it may be expected to scrutinize the security.

During the Seventy-second Congress various measures were introduced in the Senate and the House which had as their objective the expansion of agricultural credit through the use of Federal funds and facilities, but no comprehensive program had been adopted when the Congress expired by constitutional limitation on March 4, 1933. However, two statutes (Public No. 327 and Public No.

1. N. Y. Times, May 16, 1933.

430) dealing with agricultural credit were enacted during the second session of that Congress. Public No. 327 continued the policy of direct lending by the Secretary of Agriculture to farmers to finance crop production, planting, fallowing, and cultivation, and the acquisition of feed for farm livestock in drought and storm stricken areas, but a new provision was added authorizing the Secretary to require the borrower, as a condition of his loan, to reduce his acreage or production by not more than 30 per centum. Public No. 430 contains a number of provisions designed to simplify the operations of the Federal land bank system and to liberalize the terms of payment of principal and interest by delinquent borrowers from the land banks. This Act also provided for direct loans by such banks to farmers residing in localities where national farm loan associations had not been formed or where the banks were unable to accept applications from such associations. The maximum amount of any such loan was fixed at $15,000 but this limitation was removed when the direct loan provision was amended by section 26 of Public No. 10, 73d Congress, hereinafter discussed. Postponement of payment of principal for a five-year period was permitted by Public No. 430, as well as the reamortization over a 40-year period of amounts due the Federal land banks, with the approval of the Federal Farm Loan Board. The balance of the $125,000,000 new capital provided for the Federal land banks by the Act of January 23, 1932, was to be devoted to the extension of loans and the making of new loans.

Creation of Farm Credit Administration

The solution of the general problem of farm credits was undertaken by the new administration as soon as the Seventy-third Congress was convened in special session, and the first step in this direction was the reorganization and consolidation of all the agricultural credit agencies of the Federal government. This was accomplished by an Executive order of the President issued pursuant to the authority delegated to him under sections 401 and 403 of Title IV of the so-called "Economy Act" (Part II of the Legislative Appropriation Act, fiscal year 1933), as amended. By this Executive order, which was submitted to the Congress on March 27th and became effective on May 27th, the Federal Farm Board and the offices of its appointive members, except the chairman, were abolished and a new organization, known as the Farm Credit Administration was established, with jurisdiction and control over all the functions relating to farm credit which had been exercised by the Federal Farm Loan Board, the Farm Loan Commissioner, the Secretary of Agriculture, the Secretary of the Treasury, the Crop Production Loan Office and the Seed Loan Office of the Department of Agriculture, and the Reconstruction Finance Corporation. The functions of the Secretary of the Treasury as a member of the Federal Farm Board and the Secretary of Agriculture as a member of the Federal Farm Loan Board were likewise abolished, together with the offices of the appointive members of the Federal Farm Loan Board, except the Farm Loan Commissioner, to whom was transferred the functions of the latter Board. The name of the office of Chairman of the Federal Farm Board was changed to the Governor of the Farm Credit Administration and he was vested with all the powers and duties of the Federal Farm Board. He was also directed to proceed to wind up the activities of the stabilization corporations recognized under section 9 of the Agricultural Marketing Act.

Emergency Farm Mortgage Act

The next step in the legislative processes relating to agricultural credits was the enactment, on May 12, of the Emergency Farm Mortgage Act of 1933, which is similar in many respects to S. 1110, introduced by Senator Robinson on April 3, and H. R. 4795, introduced by Representative Jones on April 10. This Act, which comprises sections 21 to 42, inclusive, of Public No. 10, 73d Congress, was designed primarily to improve the credit facilities of the Federal land bank system and to make it possible for borrowers on farm real estate, either through the system or otherwise, to refinance their indebtedness on liberal terms.

Section 21 authorizes the Federal land banks to issue not exceeding $2,000,000,000 of farm-loan bonds, at a rate of interest of not more than 4 per centum, which shall be guaranteed as to interest by the United States. The authority to issue such guaranteed bonds is to cease whenever in the judgment of the Farm Loan Commissioner (whose title was later changed to Land Bank Commissioner by section 80 of Public No. 75) farm-loan bonds of the Federal land banks not so guaranteed are readily salable in the open market at a yield not in excess of 4 per centum and in any event at the expiration of two years.

These bonds may be used in three ways: First, to exchange for or purchase outstanding farm mortgages on the best terms possible; second, to make new loans on farm mortgages; third, after the expiration of one year, if in the judgment of the Farm Loan Commissioner the bonds are not required for the first two purposes, to refinance at lower interest any outstanding issues of Federal farm-loan bonds.

Section 22 authorizes the Federal land banks to buy, or to exchange bonds for, outstanding farm mortgages. The savings thus effected must be passed on to the farmer borrower. The price paid by a Federal land bank for any mortgage must not exceed the amount of unpaid principal of the mortgage, or 50 per centum of the normal value of the land mortgaged plus 20 per centum of the value of the permanent insured improvements, whichever is the smaller.

Section 23 authorizes the Federal land banks for five years to grant extensions to farm borrowers who are shown to be deserving. In order to enable the Federal land banks to grant such extensions, the Secretary of the Treasury is directed, upon request of a Federal land bank and with the approval of the Farm Loan Commissioner, to subscribe to the paid-in surplus of the Federal land bank an amount equal to the amount of the extensions. Fifty million dollars is authorized to be appropriated for the purpose, and the appropriation was subsequently made by Public No. 77. Repayment of these subscriptions may be made at any time by the bank with the approval of the Commissioner and must be made when he believes the bank has resources available for the purpose.

Section 24 reduces for a period of five years the interest rate on all outstanding and new loans made

by the Federal land banks, through national farm-loan associations or agents, or purchased from joint-stock land banks, to 4½ per centum per annum, and suspends the payment of principal during the same period in cases where the borrowers are not in default. In order to compensate the Federal land banks for the loss of interest, the Secretary of the Treasury is directed to pay to each Federal land bank the amount of such loss less any savings effected through the refinancing of Federal farm-loan bonds. Fifteen million dollars is authorized to be appropriated for this purpose for the fiscal year 1934 and such additional amounts during subsequent fiscal years as may be necessary. The appropriation of $15,000,000 was made by Public No. 77.

Section 25 raises the maximum limit of Federal land bank mortgage loans from $25,000 to $50,000, but in each case where a loan is in excess of $25,000 it must be approved by the Farm Loan Commissioner.

Section 26 authorizes the Federal land banks to make direct loans on first mortgages to farmers in localities where national farm-loan associations have not been organized or where the farmers are unable to apply for loans because of the inability of the land banks to accept applications from existing associations. Interest on such direct loans is to be at a rate one-half of 1 per centum higher than the rate on loans made through national farm-loan associations, but the rate is to be reduced when the borrower joins an association, which he must agree to do. This section supersedes the provisions of section 1 of Public No. 430, 72nd Congress, approved March 4, 1933.

Section 28 makes the interest-guaranteed bonds authorized to be issued under section 21 available as security for advances by the Federal Reserve banks on fifteen-day promissory notes.

Section 29 starts the joint stock land banks on the way to liquidation by prohibiting them from issuing tax-exempt bonds and from making any farm loans except such as are incidental to the refinancing of existing loans or bond issues or the liquidation of their real estate holdings.

Section 30 directs the Reconstruction Finance Corporation to make $100,000,000 available to the Farm Loan Commissioner to be used for two years in making loans to joint-stock land banks to aid in their orderly liquidation. Such loans are to be made at a rate of interest not exceeding 4 per centum, and are to be secured by first or purchase-money mortgages on farm property, or such other collateral as may be available to the banks. The proceeds of the loans are to be devoted to making equitable settlements with bondholders and no such loan is to be made until the bank agrees—

1. To reduce the interest rate to all its first-mortgage borrowers to 5 per centum per annum; and

2. Not to proceed against any mortgagor for two years from the date of the enactment of the Act on account of default in interest or principal, nor to foreclose its mortgage during the same period except for abandonment of the mortgaged property or unless, in the opinion of the Commissioner, such foreclosure is necessary for other reasons.

Section 31 authorizes the Farm Loan Commissioner to use not to exceed $25,000,000 of the $100,000,000 made available by the Reconstruction Finance Corporation pursuant to section 30 to make loans to joint-stock land banks at a rate of interest not exceeding 4 per centum per annum for the purpose of securing the postponement for two years of the foreclosure of first mortgages held by such banks on account of default in payment of interest and principal and delinquent taxes. During the period of postponement the interest rate to be charged the mortgagor is not to exceed 4 per centum per annum on the aggregate amount of such delinquent taxes and defaulted interest and principal.

Section 32 authorizes and directs the Reconstruction Finance Corporation to make $200,000 available to the Farm Loan Commissioner to be used in making direct loans to farmers upon first or second mortgages. The maximum loan to any one farmer is to be $5,000, and the interest is not to exceed 5 per centum per annum. The principal is made repayable in ten installments beginning during the fourth year after the loan is made, but the three-year extension for the payment of principal is to apply, however, only where the borrower is not in default with respect to any other condition or covenant of his mortgage. The proceeds of these loans are to be used:

1. To enable the farmer to refinance on better terms any secured or unsecured indebtedness.

2. To provide the farmer with working capital.

3. To enable the farmer to redeem or repurchase farm property lost by him through foreclosure between July 1, 1931, and the date of enactment of the Act (May 12, 1933) or thereafter.

Section 36 authorizes the Reconstruction Finance Corporation to make loans in an aggregate amount not exceeding $50,000,000 to drainage, levee, levee and drainage, irrigation, and similar districts, and to political subdivisions of States, which, prior to the date of enactment of the Act, have completed projects devoted chiefly to the improvement of land for agricultural purposes. Such loans are to be made for the purpose of enabling such districts or political subdivisions to reduce and refinance their outstanding indebtedness incurred in connection with projects which the corporation finds to be "economically sound." The borrowers from the corporation are required to reduce the indebtedness to them of land owners within their projects by an amount corresponding to that by which the borrowers' own indebtedness is reduced by reason of the operation of the section. This section was later amended and clarified by section 19 of Public No. 78.

Section 37 authorizes the Reconstruction Finance Corporation, upon request of the Secretary of the Interior, to make available not to exceed $5,000,000 to the Federal reclamation fund for the completion of projects under construction or approved and authorized. The funds so advanced are to be repaid within five years with interest at the rate of 4 per centum per annum, out of receipts accruing to the reclamation fund.

Section 40 authorizes the Governor of the Farm Credit Administration to establish and fix the duties of such organizations within the Administration as are necessary to carry out the functions vested in him or in the Administration by law or Executive order, but the payment of compensation in excess

of $10,000 per annum to any person employed under the section is prohibited.

Farm Credit Act

The Farm Credit Act of 1933 (Public No. 75, 73d Congress) supplements the authority conferred upon the Governor of the Farm Credit Administration by the Executive order of March 27 and section 40 of Public No. 10, and outlines the direction which the granting of short-term agricultural credit by the Federal Government is to take.

Production Credit

The outstanding feature of this Act is that it provides for the financing of agricultural production through stock subscriptions by the Government in cooperative organizations of producers rather than through direct loans by the Government as heretofore. In order to accomplish this purpose the Governor of the Farm Credit Administration is required to establish in the Federal land bank districts twelve Production Credit Corporations, each with a board of directors composed of the directors of the Federal land bank of the district in which the Corporation is located (Sec. 2). The stock of these Corporations is to be subscribed for by the United States out of a revolving fund of $120,000,000 (Sec. 5) and the amount of such stock is to be fixed and adjusted by the Governor in accordance with the credit needs of the district (Sec. 4). The funds of these Corporations are to be invested in stock of (1) local Production Credit Associations which are to be organized by ten or more farmer borrowers and to be operated by them subject to the supervision of the Corporations, and (2) cooperatively-owned agricultural production credit corporations not organized under the Act (Sec. 6[a]). The stock of the Association is to be divided into two classes: Class A owned by the regional Production Credit Corporations and investors, and Class B owned by borrowers (Sec. 21). Each borrower must own $5 worth of Class B stock for each $100 of the amount of his loan. The local Production Credit Associations are authorized to make loans to their farmer borrowers for "general agricultural purposes" under terms and conditions to be prescribed by the Production Credit Corporations (Sec. 23) and the paper given by the borrowers to the Associations may be discounted with the Federal Intermediate Credit Banks (Sec. 24). General supervision over the Production Credit Corporations and Associations is vested in the Governor of the Farm Credit Administration.

Credit for Cooperatives

Titles III and IV of the Farm Credit Act provide for the extension of credit to cooperative associations of agricultural producers which, under the Agricultural Marketing Act, was mainly available for the merchandising of agricultural products and for financing facilities used by such cooperative associations. For the purposes of extending this type of credit, which has been provided heretofore by the Federal Farm Board, the Governor is authorized to establish a central bank in Washington to make loans to national cooperative agricultural associations, and twelve regional banks, one in each Federal land bank district, which will make loans to local cooperatives. (Sec. 2 and 38). The capital for these banks is to come out of the revolving fund heretofore available to the Federal Farm Board (Sec. 33) and the central bank is authorized to issue debentures up to five times the amount of the bank's paid-in capital and surplus (Sec. 37).

Title V of this Act also extends the credit facilities made available under the Agricultural Marketing Act so as to provide for loans for refinancing the acquisition or construction of physical marketing facilities up to 60 per centum of their value at a rate of interest not less than 3 per centum or more than 6 per centum (Secs. 52 and 53), and authorizes the making of loans to cooperatives which purchase supplies for their members (Sec. 55). The Governor of the Farm Credit Administration is authorized to fix the interest rates on loans for marketing and purchasing at 1 per centum in excess of the discount rate of the Federal Intermediate Credit Banks and, in the case of loans to finance physical facilities, at a rate in conformity with that charged by the Federal land banks.

General and Miscellaneous Provisions

The corporations created under the Act are given the usual Federal corporate powers (Sec. 60), but powers of regulation and control are given to the Governor by way of direct action or amendment of charters. Provision is made for annual and other examinations of the institutions at their expense (Sec. 61). Criminal penalties are imposed for fraudulent conduct in connection with their business (Sec. 64). The corporations and their securities, property and income are to be tax-exempt until such time as the stock held by the United States has been retired (Sec. 63). Provision is also made in the case of the organizations created under the Act for the accumulation of reserves and surpluses and the limitation of dividends.

Borrowers under the Act are to be represented on the joint board of directors which is to manage the Federal Land Banks, the regional banks for cooperatives and the Production Credit Corporations. Of the seven directors of such joint board, there are to be three local directors, one chosen by national farm-loan associations and land bank borrowers through agencies, one by Production Credit Associations, and one by borrowers from regional banks for cooperatives; three district directors appointed by the Governor, two of whom are to represent the public interest and one of whom is to represent national farm-loan associations and borrowers through agencies; and a director at large appointed by the Governor. (Sec. 70[a]).

Three important amendments are made to the Federal Farm Loan Act. Section 72 removes the double liability of shareholders of farm-loan association stock with respect to obligations incurred after the enactment of the Act. Section 74 authorizes loans under the Federal Farm Loan Act to any person engaged or about to become enaged in "farming operations" and includes as well other persons the principal part of whose income is derived from farming operations. The Federal land banks and farm-loan associations are authorized by section 79 to enter into agreements to share losses and gains on account of the disposition of lands under a defaulted mortgage.

The name of the office of Farm Loan Commissioner is changed to Land Bank Commissioner and the 8-year term is abolished with respect to incumbents hereafter appointed (Sec. 80[a]). Section 80(b) establishes in the Farm Credit Administration a Production Credit Commissioner, a Cooperative Bank Commissioner, and an Intermediate Credit Commissioner, each of whom is to be appointed by the President by and with the advice and consent of the Senate.

A NATIONAL BAR PROGRAM SUBJECT

WHAT CONSTITUTES A GOOD LEGAL EDUCATION?

Defects and Consequences of Long Prevalence of the Langdell Theory and Method of Teaching Law—Advantages of a Substitute Plan Wherein the Law Office Would Be the Center of the Law School, the Practitioners Would Be Teachers and Subjects Would be Studied Not Discoverable in an Ordinary Law Office—Such Method Might Produce Lawyers of the Kind Needed in Present Economic Crisis—The Experiment Urged*

By Jerome Frank

IT IS presumptuous of me to talk about what constitutes a good legal education. I know no lawyer who has had one. Certainly I have not. Had I, it would doubtless have been easy for me to dash off a learned essay on the subject in the few hours that remain after the working day of Government servants of the New Deal (8 a. m. to 12 p. m.). As it is, I am obliged to offer you merely a few sketchy notes, in which, for lack of time, I shall be obliged to over-indulge in the ugly first personal pronoun.

Let me begin by summarizing what I said in a recently-published paper. I there urged the rediscovery of the apprentice method of teaching lawyers. That method, it was suggested, had become discredited largely because of the popularity, during the past half-century, of the Langdell-Harvard system. The peculiarities of that system were diagnosed as a derivative of the strange personality of its founder, Christopher Columbus Langdell. He was a cloistered, a bookish, a library-minded man. His pedagogic ideal is directly traceable to his personality. In his student days he haunted the library, pouring over the Year Books; he is said to have expressed regrets that he had not lived in the time of the Plantagenets. In his sixteen years of practice he led a secluded life, seeing little of clients, for the most part in the law-library writing briefs and drafting pleadings for other lawyers. One of his biographers says of him, "In the almost inaccessible retirement of his office, in the library of the Law Institute, he did the greater part of his work. He went little into company." Returned to Harvard as a law-teacher, he is said to have referred to "a comparatively recent case decided by Lord Hardwicke."

His pedagogic theory reflected the man. The experience of the lawyer in his office, with clients, and in the courtroom were, to Langdell, improper materials for the teacher and his student. They must shut their eyes to such data. They must devote themselves exclusively to what was discoverable in the library. The essence of his teaching philosophy he expressed thus: "First that law is a science; second, that *all the available materials of that science are contained in printed books.*"

This second proposition, it is said, was "intended to exclude the traditional methods of learning law by work in a lawyer's office, or attendance upon the proceedings of courts of justice."[1]

This philosophy of legal education was that of a man who cherished "inaccessible retirement." Inaccessibility, a nostalgia for the forgotten, devotion to the hush and quiet of a library, exclusion from consideration of the all-too-human clashes of personalities in law office and courtroom, the building of a pseudo-scientific system based solely upon book-materials,—of these Langdell compounded the Langdell method.

The character of that man, I suggested, has stamped the educational methods of our leading law-schools for many years. As a consequence, most of the teachers in those schools either have had little or no experience in active legal practice or, more important, if they have had such experience, yet when they withdraw from practice to teaching, have succumbed to an atmosphere in which the experiences of practice became shadowy and unreal.

I suggested that law teaching has been struggling to break away from the excesses of the Langdell method but that in these struggles it has been hampered by the fact that the schools were still dominated by Langdell's basic dislike of active practice. I, therefore, proposed a direct attack on the problem, namely, a complete abandonment of Langdell's central aim and a reversion to the apprentice system but on a more sophisticated level. This proposal implicated at least four items which I may rephrase as follows: *First*, the entire curriculum would be built around the problems with which the courts must deal presently and in the immediate future. Judicial doctrine would be regarded primarily as dignified and formal language which must be used on public occasions. (I am well aware that nothing is more important than the right phrase in public address. But understanding must always precede expression. Legal elocution and grammar, so to speak, should be ancillary to the study of more fundamental legal problems.)

The law school would resemble a sort of sublimated law office. Most of the teachers would be actively engaged in the practice of the law, although some of them would be studying, somewhat more remotely, the solution of the governmental and business and social problems with which "the law" deals.[2] *The students*

*Address delivered before the Section of Legal Education at Grand Rapids, August 29 1933. Mr. Frank is General Counsel, Agricultural Adjustment Administration, Washington, D. C.; member of the Illinois and New York Bars; Research Associate, New York Law School; Author "Law and the Modern Mind," "Are Judges Human?" etc.

1. "Centennial History of the Harvard Law School" published by the Harvard Law School Association (1918), p. 231.

2. As to the unfortunate and misleading vagueness of the word "law," see Frank, "What Courts Do in Fact," 26 Illinois Law Review, 645 et seq; Frank, "Are Judges Human?", 80 U. of Pa. Law Review 17; 233.

would be the professors' assistants or apprentices. Problems would flood in from law offices, business organizations, social and "reform" organizations and the government itself. *Those who attended the school would be "doing" rather than merely "learning."*

Second, the majority of the teachers would have had no less than five years' experience in active and variegated legal practice.

Third, the present so-called case system would play a relatively small part; case-books would consist, for the most part, of complete records of cases from their inception in the lower courts to the final opinions in the highest courts.

Fourth, a new case system would be formulated which would carry the records of legal and governmental problems into the field of the other social arts—history, ethics, economics, politics, psychology and anthropology. Mere pre-legal courses in those fields, unconnected with the live material of present human action, have proved a failure; the integration needs to be achieved by following an actual institution through its social ramifications. The brilliant work of Walton Hamilton and Max Radin was cited as illustrative.

In order to save your time, I ask leave to incorporate by reference the paper I have summarized; you will find it, if you care to, in the June, 1933, number of the Pennsylvania Law Review.[3]

That paper was not intended as an attack centered on the existing Harvard Law School. It was an attack on the Langdell system and on its unfortunate consequences not only at Harvard but in almost all University Law Schools. The criticisms of this attack, however, have come chiefly from Harvard. It is the character of these criticisms that I want to discuss. They miss the main point—and thereby emphasize it. For the failure to see that point demonstrates a blind spot, —a blind spot the existence of which is precisely the principal fault of the Langdell method.

With that in mind, I call your attention to a letter I recently received from one of Harvard's most distinguished older teachers. He first challenged my statement that Langdell is said to have referred to "a comparatively recent case decided by Lord Hardwicke." This, the professor said, tended to demean the memory of a great man; Langdell, he asserts, had referred to a recent decision of Lord Eldon, not of Lord Hardwicke. Perhaps the difference is important. To me it seems trifling and indicates that the professor's defense is feeble. But if it be important, and if it be true that such a reference by Langdell to Hardwicke would have been unworthy of a great pedagogue, then it should be noted that "The Centennial History of the Harvard Law School" (published in 1918 by the Harvard Law School Association) quotes Langdell "as speaking of 'a comparatively recent case decided by Lord Hardwicke'" and goes on to say that Langdell "was believed to regard modern decisions as beneath his notice. In the subjects of Equity and Suretyship, which he was then teaching, one might have fancied from his list of cases that Lord Eldon was still on the woolsack and that America was legally undiscovered."

In the same letter the professor objected that I had said, "Did not President Eliot of Harvard boast that Harvard Law School was revolutionary because its faculty consisted of a 'body of men who have never been on the bench or at the bar?'" The professor asserts that President Eliot could not have made that statement, that many Harvard law teachers had been practitioners and that many of the Harvard Law School professors now on the staff have had actual experience at the bar.

Now it must be confessed that I was guilty of carelessness in quoting President Eliot,—that in quoting him I inadvertently shifted the tenses. President Eliot was speaking, in 1888, of the appointment of Dean Ames in 1873. Ames, it will be recalled, was without experience in practice. Recalling the adverse comments on Ames' appointment, Eliot spoke as follows: "What is to be the ultimate outcome of this courageous venture? In due course, and that is no long term of years, there *will be produced* in this country a body of men learned in the law who have never been on the bench or at the bar, but who nevertheless hold positions of great weight and influence as teachers of law, as expounders, systematizers, and historians. This, I venture to predict, is one of the most far-reaching changes in the organization of the profession that has ever been made in our country."[4]

I confess, with humility, the misquotation. I could perhaps explain how it happened, but that would not explain it away. I did, by the shift of tenses, inadvertently make it appear that President Eliot was describing what had already happened, whereas in fact he was predicting what was bound to occur.

But, I submit, the professor in emphasizing this mistake has failed to observe that, fundamentally, President Eliot's prediction has proved to be accurate. First of all, it should be noted that I did not say that all past and present Harvard law professors were or are men who had never practiced. On the contrary I expressly noted that Professor Langdell himself had practiced for sixteen years; that Professor Gray and Professor Kales were notable examples of men who had continued in practice while teaching; that Professors Frankfurter and Morgan have had first-hand contact in actual practice with courts and lawyers and clients.

What I did assert and now reassert is that the spirit of Langdell has resulted in sterilizing or numbing the teaching value of even the most experienced men; that Langdell's ideal has had a blighting effect on American legal educators and legal education. The spirit, if not the letter, of President Eliot's prediction has come true to an alarming extent, in spirit, even if not literally,— and especially in law schools, scattered over the country, which follow the Harvard ideal even more devotedly than does Harvard.

In the Centennial History of Harvard Law School it is said that Langdell believed that law was a science and that "to learn this science, as to learn any other, the student must seek the living founts—he must deal in the stuff that forms the subject-matter of his study." Langdell said: "The library is to us what the laboratory is to the chemist or the physicist and what the museum is to the naturalist." He held that "The most essential feature of the School, that which distinguishes it most widely from all other schools of which I have any knowledge, is the library. . . . Without the library the School would lose its most important characteristics, and indeed its identity." And, in the same spirit, the President commented, "The Corporation recognizes that *the library is the very heart of the School,*" and in the Centennial History (published in 1918) it is said, "If it be granted that law is to be taught as a science

3. "Why Not a Clinical Lawyer-School?", 81 University of Penna. Law, 907.

4. "Centennial History of the Harvard Law School," 81.

and in the scientific spirit, previous experience in practice becomes as unnecessary as is continuance in practice after teaching begins."

That spirit has choked legal education. It has compelled the experienced practitioner, turned teacher, to belittle his experience at the bar. It has forced him to place primary emphasis on the library, to regard a collection of books as the heart of the law school. *A school with a library as its heart* is what one may well imagine. The men who teach there, however interested they may once have been in the actualities of the law office and the court room, must pay only a subordinate regard to those actualities. The books are the thing. The word, not the deed. Or only those deeds which are or become words. Verbal acts, so to say, are central and all else peripheral.

In such a school, that which is not in books has become "unscientific"; it may perhaps have truth, but it is a lesser truth, relatively unreal; true reality is achieved by facts only when reported in books. To be sure, Dean Pound, many years ago spoke of "law in action." That awakened hopes. But has Harvard been showing its students "law in action?" The students have had the opportunity to read in books and law review articles about some very limited phases of law in action. But, again, that does not constitute first-hand observation of or participation in law in action. It is, at most, *law in action in the library.*

At Dean Pound's law school the students are given courses in evidence, practice, and pleading. Close by, courts are in action. There one can observe evidence in action, practice in action, pleading in action, torts in action, property in action. Are the students urged to attend those courts frequently? Do they spend many days there? Are they accompanied there by their professors who comment thereafter on what has been observed? Are the students familiar with the development of cases in those courts? Are they permitted to speculate on the next move to be made—at a time when the results of that move depend on foresight, and skill, instead of hindsight? Are the procedural possibilities of a law suit shown to the students by their professors, together with the so-called substantive law formulae, —or are the two split up into separate courses? I mention Harvard. I could as well refer to almost any leading law school. Do they make any effort to watch, describe and interpret courts in action?

"Law in action" was a happy phrase. It contained, to be sure, that miserably ambiguous word "law."[5] Yet it was a pointer or guide-post, it seemed to indicate a new direction. But what university law school has followed the pointer? The phrase "law in action" has remained a phrase; at any rate, so far as legal pedagogy is concerned, the phrase has had little in the way of practical consequences. One begins to suspect that the function of that phrase, psychologically, was to substitute a verbal formula for revised conduct. The contents of the bottle remained much the same, the label was changed. One is reminded of the scene in the Gilbert and Sullivan opera where the policemen march around and around the stage promising the distracted father that they will rescue his daughters from the pirates who have abducted them. "We go, we go," shout the policemen as they continue to march in circles. "But they don't go," exclaims the father despairingly.

Litigation is the ultimate reference for the lawyer. In the last analysis, legal rights and duties, so-called, are nothing more or less than successes or failures in law suits.[6] A lawyer who has inadequate acquaintance with litigious processes is an impotent lawyer. If it were not for a tradition which blinds us, would we not consider it absurd that, with litigation laboratories just around the corner, law schools confine their students to what they can learn about litigation in books? What would we say of a medical school where students were taught surgery solely from the printed page?

But if litigation is the lawyer's ultimate reference, it is not all there is to a lawyer's life. The corporate director's meeting, the title closing, the consultation with clients, the negotiation of settlements—these, too, are part of practicing law. Corporations in action, trusts in action, wills in action—these, too, the law student should observe. All that, is an essential part of law in action (if we must use the word law).

And all that is alien to the Langdell spirit. That spirit, I grant you, is somewhat weakened. The undiluted principles of Langdell are nowhere in good repute today. But they are still the basic ingredient of legal pedagogy, so, that, whatever else is mixed with them, the dominant flavor is still Langdellian. Our leading law schools are still library-law schools, book-law schools. They are not, as they should be, *lawyer schools.*

Nothing I have said must be taken as indicating a disbelief in the practical effect of words, for good or ill. No one, however superficial his knowledge of psychology, can fail to note the potency of words, printed or spoken. They are indispensable human tools; often, alas, they become our masters.[7] A lawyer needs, indeed, to learn much about words and their ways, especially about lawyers' and judges' words and their ways.[8] But those are not the principal factors in a lawyer's life.

I must confess that I love books and dote on words. Some time ago, I read in a medical dictionary the word "aphose". It was defined as "the subjective sensation of shadow." Believing in words in action, I have tried, ever since, to bring the word "aphose" into a conversation. I have failed to date. But now it is relevant. The Langdellian teacher, one could say, deals in aphoses; what he passes on to his students is an aphose—a subjective sensation of the shadow of the actualities of a lawyer's life.

If the teacher is an imaginative genius, he may make the shadow vivid. But why should the teacher deal in shadows? No one, if he could do otherwise, would teach the art of playing golf by having the teacher talk about golf to the prospective player and having the latter read a book relating to the subject. The same holds for toe-dancing, swimming, automobile-driving, haircutting, or cooking welsh rarebit. Is legal practice more simple? Why should law teachers and their students be more hampered than golf teachers and their students? Who would learn golf from a golf instructor who contented himself with sitting in the locker room analyzing newspaper accounts of important golf matches that had been played, by someone else, several years previous? Why should law teachers be Tomlinsons? "This I have read in a book, he said, and this was told to me, and this I have thought that another man thought of a Prince in Muscovy."

Practicing law is an art, a fairly difficult one. Why make its teaching more indirect, more roundabout,

5. See citations, note 6 supra.

6. See citations, note 6 supra; Frank, "Law and the Modern Mind," *passim.*
7. "Law and the Modern Mind," 57 et seq; 84 et seq.
8. Cf 26 Ill. Law Review at 764-768.

more baffling and difficult than teaching golf? But that is what the Langdell method has done.

Teaching law would be no "cinch" at best. The Langdell method has increased the difficulties, has made the task of the teacher as complicated as possible. Even the teacher who is a genius cannot overcome the obstacles. When I was at law school, I sat next to a Chinese student who had learned his English in Spain. As a consequence, when he took his notes on what the American professors said, he took them in Spanish. On inquiry, I ascertained that he actually thought them in Chinese. University law teaching today is involved in a process not unlike that. It is supposed to teach men what they are to do in court rooms and law offices. But it stays as far away as possible from court rooms and law office. What the student sees is a reflection in a badly-made mirror of a reflection in a badly-made mirror of what is going on in court rooms and law office. Why not smash the mirrors? Why not have the students directly observe the subject matter of their study, the teachers acting as enlightened interpreters of what is thus observed?

I will be told — I have been told — that the law schools have but three short years to train lawyers and that these years are already so crowded that there is no time to spend on the sort of first-hand material to which I have been referring. I am not much impressed with such talk about three short years; in most University law schools the major part of the three years is spent in teaching a relatively simple technique—that of analyzing upper court opinions, "distinguishing cases," constructing, modifying or criticizing legal doctrines.

Three years is much too long for that job. Intelligent men can learn that dialectical technique in about six months. I have seen them do it and so have you. Teach them the dialectic devices as applied to one or two fields and they will have no trouble applying them to other fields. But in the law schools, much of the three years is squandered in applying that technique over and over again to a variety of subject matters,—torts, contracts, corporations, trusts, suretyship, negotiable instruments, evidence, pleading, and so on. Of course it is impossible in three years, or indeed in thirty-three years, to give or take courses in all the subjects into which the subject we call "law" can be subdivided.

If you measure the limited number of courses that can be covered in three years over against the totality of subject matters which a lawyer, when engaged in general practice, will encounter, three years seems all too short. But the point is that the able lawyer, if once he has mastered the dialectic technique in respect of one or two subject matters, can in short order become adept in coping with a great variety of subject matters. Teach a man the *stare decisis* game with respect to the so-called law of contracts or trusts, and he will have little trouble in playing that game with respect to corporations, insurance, or what-not.

(I may say, in passing, that the time is ripe to question whether there is such a thing as the "law of" contracts or torts or insurance, or pleading, or evidence, etc., but I shall not attempt to discuss that question here and now.)

Langdell put a premium on remoteness from the actualities of the lawyer's life. "What qualifies a person to teach law," he said, "is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes . . ." One of his biographers reports, as I have noted, that it was a fundamental part of Langdell's method to exclude the "methods of learning law by work in the lawyer's office, or attendance upon the proceedings of courts of justice."

There is the cause of the weakness of current legal pedagogy. It has not transcended Langdell to any considerable degree. Where the Langdellian atmosphere is thickest, teaching is weakest; where that atmosphere is thinnest teaching is strongest. Contrast Harvard and Yale. I do not say that Yale teachers are abler than those at Harvard. It may be that the reverse is the case. I do not know. I say that, if teaching at Harvard is to be as effective as that at Yale, the teachers must be twice as good, for they have twice as many obstacles to overcome. The Langdellian fog has not yet entirely lifted at New Haven, but it is only half as choking and blinding there as at Harvard.

Witness a recent event. At Harvard University there has been for some time an admirable School of Business where the economics of business enterprise are studied in the field and put under the microscope. The relations of those studies to the work of many lawyers is obvious. I am told that it was suggested by the teachers of the Harvard Business School that they cooperate with the teachers at the Harvard Law School. There is reason to believe that some of the Harvard law faculty are sufficiently non-Langdellian to have welcomed that experiment. But Harvard Law School, as an official entity, would apparently have none of it. Law in action, whatever else it might mean to those who govern the curriculum at Harvard Law School, seemingly did not mean law in action in relation to business enterprise.

But Yale Law School saw the possibilities. And now the faculties and students of Yale Law School and Harvard Business School are about to cooperate. The shade of Langdell will shudder, to be sure, but the students who are the beneficiaries of this joint adventure may come to learn something about the legal aspects of the economic system in which, for the moment, we are living.

I trust my enthusiasm about the possibilities of that project will serve to dissipate any impression that I am advocating a plan for legal education which will produce mere legal technicians. It is imperative that lawyers be made who are considerably more than that. Our current economic plight is ascribable in part to the failure of our profession to comprehend the nature of business enterprise, to judge it critically, to advise their clients of its deficiencies and of the possibilities of its modification. Among the best servants of the New Deal are lawyers who, by some accident or other, have arrived at some such wisdom.

But mere social insight is no more a sufficient equipment for a lawyer than for an engineer or nurse. The lawyer, whatever else he needs, needs to be an effective legal practitioner, an adequate technician. The law student should learn, while in school, the art of legal practice. And to that end, the law schools should boldly, not shyly and evasively, repudiate the false dogmas of Langdell. They must say "Yes" to his "No." They must decide not to exclude, as did Langdell, but to include the "methods of learning law by work in the lawyer's office and attendance upon the proceedings of courts of justice." They must right-about-face, and say "What qualifies a person to teach law *is* experience in the work of a lawyer's office, in dealing with men, in the trial and argument of cases." They must repudiate the absurd notions that the heart of a law school is its library, that what distinguishes

one law school from another is the number and kind of books on its library shelves, that the library is the lawyer's laboratory, that the "living founts" for the lawyer are to be found in inert paper covered with printer's ink. They must learn to see that libraries and books are on the outer edge of matters lawyer-like, and that at the center is the conduct of human beings —clients, witnesses, judges, juries, legislative committees, stock market manipulators, labor leaders, presidents of corporations, farmers, and other lawyers. We live in a society and under a government of men and not of laws,[9] and the ways of these men, lawyers must know and deal with.

I was educated, some twenty years ago, in a law-school excellently equipped to carry out the Langdell method. Its first acting dean had been Professor Beale, an admirable Langdellian. A majority of the members of the teaching staff were among the most brilliant students graduated from Harvard. Langdell was deity and Ames his prophet. Skill in the analysis of upper court opinions and the elaboration of exquisitely made legal doctrine were of the very essence of the pedagogy.

I was thoroughly engrossed in this type of study. There was a sharp tang in the intellectual atmosphere. Intellectual it was indeed. The untidy disciplines of economics, politics and history, to which I had devoted myself in undergraduate days, seemed remote and unimportant.

And then, in my third year, I sat at the feet of a different kind of teacher. He studied at Harvard, had indeed been one of its keenest-minded graduates, one of the favorite students of Ames; he had helped to found the Harvard Law Review. He talked much of the Ames' theories, such as "equity acting in personam"; indeed one of the stupider students bought a copy of Ames' notes as a "trot" or "pony" for the course. But this teacher had been a practicing lawyer and was now on the bench. And he told us much of how problems were flung, in the raw, at lawyers by clients or at judges by lawyers. We began to understand what an unlogical, shifting, untidy, uncertain, thoroughly human, catch-as-catch-can thing we were going to be grappling with, once we had passed our bar examinations. The course itself, judged by Langdellian standards, was untidy and sloppy. The poorer students protested. Their notes were in bad shape. They could not fit them into any order or system. There were no eight rules with fourteen exceptions. You never knew precisely where you were. There was a stimulating air of fragmentariness about. I am not sure that our teacher was altogether aware of the nature of his own teaching technique. He thought he was teaching us good old Ames' doctrines. What he was teaching was law as she is practiced.

Judge Julian Mack—for he was the teacher—was one of the first professors effectively to begin the break away from the Langdell tradition. That he did it more or less unwittingly, perhaps made his defection the more effective.

Ever since, it has seemed to me that Judge Mack was heading in the right direction. At the end of the road he was traveling was apprentice training. He was finding his way back to a method of teaching which this country largely abandoned many years ago. We need to revive that method and improve it.

The result would be the creation of law schools in important respects resembling our best medical schools where, Flexner tells us, *"at one and the same time medicine is practiced and studied—teachers and students mingling freely and naturally in both activities* . . . From the standpoint of *training, fragmentariness, if stimulative and formative, is desirable rather than otherwise,* for the medical school, not undertaking to turn out a finished product, but rather to train the student in method and technique, logically addresses itself to intensive and thorough study of relatively few patients rather than to extensive contact with many . . . The student must acquire a vivid sense of the existence of breaks, gaps, and problems. He is left, in possession, it is to be hoped, of an actute realization of the relatively narrow limits of human knowledge and human skill, and of the pressing enigmas yet to be solved by intelligence and patience." Here is much that law schools should ponder carefully.

I repeat that what I am urging is a law-school with a law office as its center. It would not be a mere law office, for the practitioners would be teachers and there would be studied subjects not discoverable in an ordinary law office. But the bulk of the teaching staff would be in active practice. We would have not a law school but a *lawyer school.*

A Harvard professor writes me that he is skeptical about the suggestion that most law teachers should have had from five to ten years of variegated practicing experience. Many a practicing lawyer, he writes, has made a poor teacher. To be sure. Such practical experience may be a necessary and yet not a sufficient condition. Something more than several years of practice is required to produce a good law professor. Of course, therefore, I do not mean that anyone who has had that experience will be a good teacher. If someone were to say that whiskey is not good unless it has aged five years he surely should not be taken to mean that any liquid that has aged five years is good whiskey or worth drinking.

To make good whiskey is comparatively simple. To make a good law teacher is probably impossible; he is born, not made. But given the necessary spark of genius, the law teacher will be the better for practical experience, the worse if he has not had it. Some men are good law teachers despite the fact that they have had no prolonged practical experience. But they are scarce; the handicaps are considerable. (These remarks are not applicable to such men as Walton Hamilton and Max Radin whose task it is to integrate legal and other disciplines.)

It will doubtless be urged in answer to the foregoing that the Langdell-patterned law schools have turned out our most "successful" lawyers. I may add, parenthetically, that a majority of the ablest men on my present legal staff are Harvard men. But (if I may repeat what I have said elsewhere) that may well be *in spite of and not because of their method of instruction.* The experiment has not been a controlled experiment. For the students who attend university law schools, such as Harvard, are usually the pick of the lot. And they are not only the brightest students; they are the wealthiest, best connected socially and the like. Also, the fact of having gone to a university law school such as Harvard gives them prestige. Indeed for some three decades it was almost impossible for a man to obtain a legal education in a law school that was not Langdellian. The Langdell method was the prevailing method and most lawyers, dull or stupid, successful or unsuccessful, necessarily were products of that method.

9. Frank, "Mr. Justice Holmes and Non-Euclidean Legal Thinking," 17 Cornell Law Quarterly., 568; "Law and the Modern Mind," *passim.*

Most successful lawyers today do not wear beards, but it will scarcely be contended that the current habits as to hirsute facial decoration explain their achievements; and, just so, the correlation of Laugdellian training and legal success may be accidental. In the days before the modern law schools arose, it could have been said, "Most successful lawyers have been educated under the apprentice system of reading law in law offices." The point is that the two systems of legal education have never paralleled one another at a time when both were working with the same kind of student material.

I do not intend merely to be negative, to indicate that the mere departure from Langdellianism is, in and of itself, sufficient. (I might believe that garlic in my meat would be objectionable and yet not be satisfied that the mere absence of garlic in my meat would ensure a satisfactory meal; I might dislike a certain city and yet not find that dwelling in any other city, no matter which one, would make me happy.) To abandon the pedagogy of Langdell is not enough. We must find a satisfactory substitute. The one I have outlined seems to me to be such. But the suggestion is humbly and tentatively made. I think it deserves a trial. I am urging an experiment.

Would it yield a good legal education? To answer that question one must define the word "good" in this context. That would involve more time than I have at my disposal. But I can approach that discussion by asking this question: Would such a teaching method have produced lawyers of the kind that the country needs to help it meet the present economic crisis? I think perhaps it might. And, since I think so, I can say that I wish that such a system of legal education had been in existence for the past twenty or thirty years.

INHERENT AND IMPLIEDLY GRANTED JUDICIAL POWER OVER THE BAR; A REJOINDER

Issue Presented Is Clear and of Vital Importance to the Profession as Whole and Particularly to All Friends of Effective Bar Organization—Criticism of Mr. Miller's Argument in Support of Illinois View of Judicial Power—Either the Legislatures or the Courts Have Exclusive Power to Organize Bar—Legislative Competency Upheld

BY CHARLES A. BEARDSLEY
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THE September JOURNAL printed my article, entitled "The Judicial Claim to Inherent Power Over the Bar"; and the October JOURNAL printed Mr. Amos C. Miller's reply, entitled "The Illinois View of the Judicial Power—A Reply." This is written as a rejoinder to Mr. Miller's reply.

Until recently, it has been pretty generally conceded that the only method of securing an integrated self-governing bar is by statutory enactment. By that method, in the last fourteen years, thirteen such organizations have come into being; and, in a majority of the other states, voluntary bar associations have been endeavoring, by the same method, to secure integrated bars. The recent adoption by the Supreme Court of Illinois of a rule conferring disciplinary powers upon two voluntary bar associations, was accompanied by suggestions that here was a new-found method of integrating the bar; and it was broadly asserted that it was no longer necessary to depend upon favorable action by state legislatures.

It is not directly asserted that the thirteen state bar acts are unconstitutional, or that the voluntary bar associations in some twenty states are wasting their time in endeavors to secure similar unconstitutional legislation. In fact, it is intimated that the Illinois method of organization is simply an alternative method, and that the bar of each state can adopt whichever method appeals to it. If this theory were sound, Mr. Miller would be justified in objecting to my reference to the Illinois dvelopment as a threat to progress by the aid of legislation. But it cannot be sound, unless the power to organize the bar can properly be regarded as being both a judicial power and a legislative power, at the same time and under like constitutional provisions. Mr. Miller does not assert the existence of any such dual power; and no authority on constitutional law, with which I am familiar, would support any such assertion. Mr. Miller stands squarely upon the proposition that the power to organize the bar is vested in the court. Necessarily, therefore, he stands just as squarely upon the proposition that the same power is *not* possessed by the legislature.

The issue thus presented is clear; and it is of vital interest to the legal profession as a whole, and particularly to all friends of effective bar organization. Either the legislatures have the power to organize the bar and the courts have no such power, or the courts have the power and the legislative attempts at organization have been futile, and will continue to be futile.

With these preliminary observations as to the nature of the issues involved, I shall briefly reply to Mr. Miller's arguments in support of the Illinois view as to judicial power.

Although other members of the Illinois bar have referred to this new Illinois development as a striking illustration of what the courts can do by the simple ex-

ercise of their "inherent" powers, Mr. Miller emphatically denies that the rule was adopted upon the theory of "inherency." Mr. Miller says that the Illinois rule was adopted upon the other theory, which I discussed, and the soundness of which I questioned, namely, that the constitutional provision, creating the judicial department and vesting it with all judicial power, is an implied grant to the highest court of power to control and to regulate the bar. Mr.. Miller says that this theory has been generally accepted in Illinois as sound, for a period of thirty-five years—since the decision in *In re Day* (181 Illinois 73).

This thirty-five year adherence in Illinois to this doctrine would be more persuasive, if it had not been preceded by an eighty year adherence to the contrary doctrine. That it was thus preceded by such an adherence to the doctrine that the power to legislate in reference to lawyers is a legislative power, and that the courts are bound by laws passed by the legislature in the exercise of such legislative power, is pointed out in the dissenting opinion by Mr. Justice Phillips in *In re Day*.

This thirty-five year adherence loses some of its persuasiveness, also, by reason of the fact that the members of the legal profession in Illinois are in disagreement as to whether the power to legislate in reference to lawyers is possessed by the highest court because the constitution impliedly grants it, or because of the alleged soundness of the doctrine of inherency.

And this thirty-five year adherence in Illinois would be more persuasive, if it were not for the fact that, for a much longer period, the members of the legal profession in the country generally have adhered to the doctrine that this power is a part of the police power that is vested exclusively in the legislature.

In alleged support of the present Illinois view, Mr. Miller cites an article by Dean Pound, an opinion by Mr. Justice Cardozo and the prevailing opinion by Mr. Justice Cartwright in *In re Day*, the decision in which case marks the commencement of the thirty-five year period.

Mr. Justice Cartwright's opinion lends unqualified support to the present Illinois view. But both the reasoning in that opinion, and Mr. Miller's reasoning, appear to evidence a confusion between the real question involved and other questions that are not involved.

Thus, the question being whether the constitutional provision, creating the judicial department and vesting it with all the judicial power of the state, should be construed as an *implied grant* of power to control and to regulate the bar, Mr. Miller discusses that question as if it were the same question as one that might be presented by *express grants* of such power in constitutions or in statutes.

Mr. Justice Cardozo's opinion in *People ex rel. Karlin v. Culkin*, 248 N. Y. 465, cited by Mr. Miller as supporting the claim to such an implied grant of power, did not deal with any claim to an implied grant, but with the effect of express grants, in the constitution of 1777 and in various statutes to and including section 88 of the Judiciary Law adopted in 1912.

Dean Pound's article deals, not with the power of the court to control the bar, but with a substantially different subject, namely, the power of the court to adopt rules of procedure. And it does not deal with implied grants of power to adopt rules of procedure, but with *express grants* of such power. Dean Pound discusses the theory that the court *"might constitutionally be given* the power to regulate the practice"; he refers to the "statute of Colorado" granting the rule-making power to the court; he refers to such power as having been formerly "recognized in American legislation," and to the power of the reviewing court to adopt rules of procedure for the lower courts, "if not precluded by legislation." Obviously, if the exercise of the rule-making power may be "precluded by legislation," it is not a power possessed by the courts either by virtue of an implied constitutional grant, or as an "inherent" power.

The question is whether the court is impliedly granted the power to adopt rules organizing and otherwise regulating the lawyers. Both Mr. Justice Cartwright and Mr. Miller discuss—as if it were the same question—the question as to whether the court is impliedly granted the power to admit to practice, and to disbar and otherwise to discipline. While there is a difference of opinion as to whether this latter power is judicial, for the purpose of this discussion, it may be conceded that it is a judicial act thus to try and determine whether or not a particular applicant possesses the qualifications that are legally fixed for admission to the bar, and also whether or not a member of the bar has violated an obligation placed upon him by legal authority, and, if so, what is the appropriate discipline for such violation.

But the power to try and determine questions that arise in the *administration* of laws relating to lawyers, is not the same thing as the power to *enact* such laws, any more than the power to try and determine questions that arise in the administration of criminal or other laws relating to people generally, is equivalent to the power to enact such other laws.

Mr. Miller says that, when the proper classification of a governemnt powér is in doubt, the answer should be in accordance with "the common understanding on the subject at the time of the adoption of the constitution whose interpretation is sought." This proposition is unquestionably sound; but it adds no support to the present Illinois view. The constitution construed in *In re Day*, in 1899, was adopted in 1870. That in 1870 it was the "common understanding on the subject" in Illinois that it was within the exclusive power of the legislature to legislate in relation to lawyers, and that the courts were under obligation to adhere to that legislation, is strikingly demonstrated by the decisions by the Supreme Court of Illinois reviewed by Mr. Justice Phillips in his dissenting opinion in *In re Day*, all of which decisions recognized the exclusiveness of the legislative power, and the judicial obligation of adherence. Seven of these decisions are reviewed by Mr. Justice Phillips, extending over the period from 1841 to 1897; and two of them were rendered in 1869, the year immediately preceding the date of the adoption of the constitution construed by Mr. Justice Cartwright and by Mr. Miller. Mr. Miller names the decision in *In re Day*, nineteen years *after* the adoption of the constitution, as the date of the beginning of the thirty-five year period during which the present Illinois view has been "the common understanding on the subject." At the time of the adoption of the constitution whose interpretation is sought, however, the legal profession in Illinois appears to have adhered to the commonly accepted view that the power to legislate in relation to lawyers is a legislative power, and that the courts are obligated to adhere to legislation adopted in the exercise of that legislative power.

The present Illinois view that the constitutional provision creating the judicial department should be

construed as an implied grant to the highest court of power to adopt rules and regulations in relation to the bar, is not supported by arguments and precedents in relation to *express* grants of such power, or in relation to the *administration* of laws or rules passed by the legislature or pursuant to legislative authority, or in relation to the construction of constitutions in accordance with common understanding at the time they are adopted.

Some further consideration of Mr. Justice Cartwright's opinion would appear to be justified. He referred to an early Illinois decision holding that the judges had the right to distribute among themselves, and to suit their own personal tastes and convenience, the rooms provided for the use of the court in the court house; he referred to an early Wisconsin decision holding that the court had power to select its own janitor; and he then concluded:

"It would be strange, indeed, if the court can control its own court room, and even its own janitor, but that it is not within its power to inquire into the ability of the persons who assist in the administration of justice as its officers."

Disregarding the fact that the power "to inquire into the ability of" lawyers is not the same thing as the power to legislate in relation to lawyers, there is an implication in the foregoing quotation that should not, it seems to me, be passed unnoticed.

Neither the Illinois constitution, nor any other state constitution with which I am familiar, evidences any intention to make the bar a part of the judicial department.

While the bar assists the judicial department, it likewise assists the legislative department and the executive department. Its assistance to each of these departments, however, is but incidental to its assistance to the members of society, generally and individually. The members of the bar act as the legal advisers, and as the legal representatives, of the members of society; and their primary obligation is to their clients, and not to any department of the state government. Most of our service to our clients is rendered in our offices; and much, if not most, of that service is but remotely, if at all, related to the functioning of any of the three departments of the state government.

The bar is not the servant of the bench. Both the bar and the bench are the servants of the public, each with its independent, although sometimes closely related, service to perform.

When we appear in court, we appear as the servants of our clients, rather than as servants of the court; and there, as elsewhere, our primary obligation is to our clients. We do not appear in court as a matter of grace, but in the right of our clients, who, as members of the society that created the courts for the benefit of society, have never surrendered their right to present their cases to their courts. Nor have they surrendered their right thus to present their cases by and through representatives of their own choosing, subject only to such limitations as they impose upon themselves, and for their own protection, when, through their legislative departments, they adopt police regulations designed to protect society from unfit legal practitioners.

To Mr. Justice Cartwright, it appeared "strange indeed" that any one should question the power of the court to control lawyers, while conceding that the court has the power to control *"even its own janitor."* And Mr. Miller says that "much surprise" will come to the "Illinois lawyers of this generation" that any one should question the propriety of this assignment of the bar to a place in the scheme of things slightly below that occupied by the court's janitor. While of course conceding Mr. Miller's superior opportunity to judge of the attitude of the Illinois bar, I am confident that, as a whole, the Illinois bar has an honest pride and a self-respect that should be wholly inconsistent with any abject acceptance of the assignment suggested by Mr. Justice Cartwright. And I am equally confident that the legal profession generally, not excluding the legal profession in Illinois, will agree that that assignment is inconsistent with the intention of the people who framed and adopted our state constitutions.

Legislation is none-the-less legislation, because it relates to lawyers. Legislation is none-the-less legislation, because it is called a rule or a regulation, or because it is enacted by a court. Even if lawyers were properly classified with the court's janitor, as mere adjuncts to the court, legislation in reference to lawyers would be none-the-less legislation; and the enactment of such legislation would be the exercise of a legislative power, and not of a judicial power. Since lawyers are not a part of the judicial department, and, since they are not properly classified with the court's janitor, even that purported justification for judicial legislation disappears. And the total absence of any justification for any judicial claim to power to legislate in reference to the lawyers would appear equally obvious, whether the claim is based upon the theory of inherent power inborn in the court, or upon the theory that the constitutional grant of judicial power includes a constitutional grant of power to legislate in reference to lawyers.

The courts have quite enough to do, if they properly perform their judicial functions. Those functions are sufficiently exacting to tax the utmost capacity of the members of the legal profession who are assigned by society to the judicial departments of our state governments. And those functions are of sufficient importance to justify the undivided attention of the members of the judiciary.

Mr. Miller argues that the members of the judiciary are better qualified, than are the members of the legislatures, to legislate in reference to lawyers. In my former article, I expressed the contrary view. Regardless of which view is correct, the conclusion appears to be sound that our constitutions do not confer legislative powers upon the judiciary, that lawyers are justified in looking to the legislatures for further legislation in the aid of effective bar organization, and that the thirteen existing statutory and integrated bars have been created in the exercise of legislative power that cannot with propriety be questioned and that should receive the unqualified and active support of the members of the legal profession.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

THE HAGUE COURT REPORTS (*Second Series*). Edited with an Introduction by James Brown Scott. 1932. New York: Oxford University Press. Pp. xlvii, 234.—This volume contains four awards of the Permanent Court of Arbitration and one report of a Commission of Inquiry rendered since the end of the War. The earlier similar awards and reports of courts and commissions organized in accordance with the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes, were published in 1916 by the editor of the present volume, Dr. James Brown Scott. The cases contained in this report involved issues of considerable interest and decided important questions of international law. The first award decided a dispute between Great Britain, Spain and France on the one hand, and Portugal on the other, arising out of the confiscation of religious properties in Portugal by the revolutionary government of that country. The next award adjudicated French claims against Peru concerning certain debts due from the latter country to French nationals. Both of these cases are of a prewar origin and only the intervening World War prevented their earlier disposition. In the other two arbitrations the United States was a party to the dispute. The Norwegian Claims case arose from the requisition by the United States Shipping Board of vessels under construction or contracts for the building of vessels on account of Norwegian shipowners in American yards during the war. The dispute with the Netherlands related to the question of sovereignty over the small island of Palmas in the Pacific. The report of the Commission of Inquiry dealt with the sinking of the Dutch ship Tubantia by a German submarine during the war.

The awards are published in English, preceded by a short syllabus of the facts and of the holding of the court. Where the award was rendered in other than the English language, the original (French) text is printed in the Appendix. Following the award, the texts of the arbitration agreements are printed unless these were reproduced in the award itself. For the convenience of the reader, the text of the Hague Convention of 1907, for the Pacific Settlement of International Disputes is also reprinted. The historical background of these arbitrations sketched by Dr. Scott in his introduction should prove very helpful in the appreciation of the awards.

The legal profession must feel deeply indebted to the Carnegie Endowment for International Peace for making available in this convenient form this important source material of arbitral jurisprudence. The spectacular accomplishments of the Permanent Court of International Justice diverted somewhat the attention of international lawyers from the valuable contribution made by the Court of Arbitration to the development of international justice. The fact that the pleadings, proceedings and judgments of the World Court, the publication of which has been most efficiently organized, are easily accessible, has to no small extent contributed to the recent comparative neglect of the Arbitration Court by students of international law. But, as Dr. Scott properly points out in his introduction, there is ample sphere in the pacific settlement of international disputes for both the World Court and the Permanent Court of Arbitration; both can and do perform useful services and the activity of both is equally entitled to the attention and careful consideration by students of international law. This volume constitutes an essential part of the record of the Permanent Court of Arbitration.

FRANCIS DEAK.

Columbia Law School.

Glanvill De Legibus et Consuetudinibus Regni Angliae. Edited by George E. Woodbine. 1932. New Haven: Yale University Press. Pp. ix, 306. London: Humphrey Milford, Oxford University Press.—A definitive edition of the work attributed to Glanvill has long been needed. If we except the edition prepared by Sir Travers Twiss for the *Rolls Series* which was withdrawn from circulation on account of its inadequacy, this is the first printing the text has had since 1828 when, in uncritical form, it appeared as an appendix to the second volume of George Phillips' *Englische Reichs-und Rechtsgeschichte*. Faults in the existing text were many, and it is cause for rejoicing that the task of re-editing the work was undertaken and completed by Professor Woodbine whose edition of Bracton has done so much to remove a long-standing blot upon legal-historical scholarship. He has collated the existing text with no fewer than twenty-seven manuscripts and the variants which bristle at the foot of each page attest the fact that the laborious work of collation has been thoroughly done. The present text more closely resembles that prepared under the eye of Glanvill than any that has been available since the fourteenth century and, though hidden manuscripts undoubtedly will come to light, it is clear that as a whole our text will need no additional revision on serious matters. Legal scholars are once again indebted to Professor Woodbine for reliable and impeccable scholarship.

The period before Glanvill—roughly the second half of the twelfth century—is for the historian of English law one of extreme complexity. Professor Woodbine, whose acquaintance with the period is intimate, has enriched his edition of Glanvill by a long

series of notes discussing points implicit in the text. That these look forward to Bracton and the Plea Rolls rather than backward to the Leges Henrici and the contemporary Pipe Rolls is a matter of taste, though the present reviewer would have appreciated Professor Woodbine's guidance in the dim period 1118-1189: a critical age badly in need of exposition and one closely connected with the name of George Burton Adams whose chair in mediaeval history Professor Woodbine now holds. Nevertheless, the notes form not the least valuable part of a valuable book and will prove indispensable in the investigation of the origin and growth of a good deal that appears full-blown in Bracton.

On the vexed question of authorship Professor Woodbine refuses to commit himself: he admits it to be indeterminate and thus throws some doubt upon Liebermann's firm conviction that the *Tractatus* is the work of Glanvill's pen. It is probable that Maitland's attribution to Hubert Walter, which Sir William Holdsworth wisely follows, remains the most plausible view yet advanced. Glanvill's (or Walter's) knowledge of Roman law Professor Woodbine finds not at all fragmentary. His interesting discussion of the extent to which knowledge of the books of Roman law existed in England at the end of the twelfth century and his proof that our author must have been schooled in the law of the civilians or canonists necessitates a revision of current opinion on this point and re-opens a wide field for speculation upon Roman influence.

To notice even briefly many of Professor Woodbine's technical notes to the text would be impossible here. Suffice it to say that the student will find them useful not only for their insight into thirteenth century law but for the references to the printed authorities they almost always contain. Constant use of the volume over a period of months has convinced the reviewer of its accuracy and completeness: it affords in addition to a faultless text a safe guide in the wilderness of thirteenth century enrolled cases and published reports.

S. E. THORNE.

Northwestern University School of Law.

The Story of the Constitution. By Howard B. Lee, 1932. Charlottesville, Va.: The Michie Company, pp. XII, 292.—In appraising the worth of a book, it is fair that it should be measured with respect to the author's objective. So judged, this book is distinctly worth while.

"It is not written for lawyers, but for business men, teachers, students, and all others who would cultivate a finer understanding of the most important political document in the history of the world." The author is deeply concerned that many persons "have lost faith in the Constitution of their country," recognizes that the resulting situation is a serious national problem, and says that it is "due largely to the neglect of society itself. * * * Society has no moral right to condemn those who, through ignorance, fail to appreciate our Constitution as a great bulwark of human freedom, when it neglects to teach them the relation of the Constitution to their own lives and the lives of their children." He traces the attacks upon our Constitution to "adherents of an international organization of communists which controls a membership of this country conservatively estimated around 500,000. Their activities are directed and financed by the Third International, a world-wide communistic organization, with headquarters in Moscow, Russia. Their purpose is the utter destruction of our Constitution and all institutions based thereon. They avow allegiance to no government, recognize no God, and feel no restraint of conscience. The church and all its allied organization are to them an anathema." He recognizes that conditions among various groups of our society "offer a fertile field for the spread of this un-American gospel." He condemns especially the attitude of the intelligentsia and says that "the cause for the maladjustment of this group lies deeper. In most cases they may be classed among those who are restive under restraint, who despise law and order, or who desire to take and enjoy what they have not earned and who denounce our Government, under the Constitution, because it stands between them and the realization of their vicious ideals." He says that in many of our institutions of higher learning the teaching of communism has greatly increased. "In many such institutions not a few teachers, under the guise of 'liberalism' and 'economic freedom,' insist upon the privilege of teaching communistic vagaries. Such teachers have no place in American school life, and the public should demand that these intellectual Bolsheviki, who thus poison the mind of the youth, be driven from the classroom. We should make it definitely understood that public funds shall not be used to spread this gospel of treason." (p. 8-9). Then the learned author immediately says that "a fine appreciation of the Constitution, and of the superior advantages offered by it, can come only from a study of the document itself, *and a comparison of its possible opportunities for advancement with those offered by other governments, particularly that of Bolshevik Russia, which is looked upon as a Utopia by our American Communists.* Such a study is likewise highly important from the cultural viewpoint. No one knows, or can know, anything of real worth about our country until he knows its Constitution, for its history is truly the history of the Republic itself." (p. 9).

On the surface at least the learned author appears here to involve himself in a contradictory position when he urges in one paragraph that teachers who "insist upon the privilege of teaching communistic vagaries" should be driven from the classroom and, in the next, that a fine appreciation of the Constitution can come only from a study of the document itself "and a comparison of its possible opportunities for advancement with those offered by other governments, particularly that of Bolshevik Russia." The author finds it difficult to speak of or refer to communism in terms of moderation. For this reason one would hardly expect to find here a dispassionate presentment of communism such as would constitute a fair basis for comparison of its possible opportunities for advancement with those offered by other forms of government. Certain of what we regard as the worst features of communism are summarized by the author but would hardly constitute an adequate basis for the comparison which he suggests. (p. 4). For this, however, it is unfair to criticize either the author or his book. His book was written for the purpose of stating the case for our constitution and his work is entitled to be judged with reference to its accomplishment of this purpose. So judged the book is an excellent one.

The author's style is clear and concise. He has exercised rare judgment in selecting facts and events which combine importance and interest. He describes interestingly the Necessity for a Constitution, the Federal Convention, the Relation of the Constitution to the Declaration of Independence, the Struggle over Ratification and the Difficulties of the New Govern-

ment under the Constitution. He has an interesting and valuable chapter in which he states the causes which led to the proposal and adoption of the various amendments to the Constitution. His separate chapters on "General Guarantees," "Guarantees in Criminal Cases," "Guarantees in Civil Cases" and "Political Guarantees" are well written and capable of being understood by a person who is not particularly a student of politics or government. Among the most interesting and best written chapters are the two which deal with the "Early Judicial Growth of the Constitution" and "The Supreme Court and Congress." In the first of these he states the facts which led to the epoch-making decisions of Marbury v. Madison, Fletcher v. Peck, Dartmouth College v. Woodward, McCulloch v. Maryland, Osborn v. The Bank, Martin v. Hunter's Lessee, Cohens v. Virginia, Gibbons v. Ogden, Brown v. Maryland and others. In the discussion of these decisions the author marks in bold outline the course of development of a body of constitutional principle which came from the pen of the great Marshall, who had no body of precedent to guide him. In the chapter on the Supreme Court and Congress, he discusses interestingly the general distrust of the powers of the Supreme Court from the beginning down to the proposal by Senator Brookhart of "A Constitution amendment that will invest Congress with inclusive authority to determine the constitutionality of its own measures." The author's treatment of this matter is one of the best chapters in the book. In his concluding chapter he summarizes the blessings of our Constitution and says that "ours is no longer a question of how the Constitution shall be interpreted, but how it shall be preserved." With this statement some would disagree. We should not have so much inquiry as to the background of a proposed appointee to the Supreme Court if this were entirely true. It may be that there has recently come to be a problem of "how it shall be preserved" but there has always been and now is "a question of how the Constitution shall be interpreted." The background of a proposed appointee to the Supreme Court is no less a matter of concern to radicals or progressives than to conservatives and advocates of a more or less rigid maintenance of the present status of things. And the reason for this is that this background is believed to have a relationship to what the Constitution may mean to the particular judge. But this is a quibble as to a dictum which after all is unimportant here and which does not derogate from the excellence of Mr. Lee's book.

It is the reviewer's belief that the greatest peril to our Government and the main cause of such measure of failure to achieve economic and social justice as may exist is the ignorance and indifference of the average citizen with respect to governmental affairs. Even the inequalities in the distribution of wealth and the care of those who cannot achieve a reasonable minimum of success in the struggle in which individual initiative and ambition seek to assert themselves can all be remedied and achieved under our Constitution when those who have the ballot come to an agreement as to what such a program should involve and intelligently pool their votes to that end, for those who are referred to as the under-privileged are in the majority. A cursory reading of Mr. Lee's book will convince an ordinary person that this is so and will remove much of the fertility of the soil which he now finds to exist for the seeds "of un-American isms." When the system of government created by our Constitution is understood, its adaptability to the attainment of any reasonably legitimate social end is apparent and nothing need be feared from a comparison of its adaptability with that of other forms of government.

Mr. Lee has written an excellent book and the reviewer commends it heartily.

H. W. ARANT.

Ohio State University

The Foreign Relations of the Federal State. By Harold W. Stoke. 1931. Baltimore: The Johns Hopkins Press. Pp. vii, 245.—The present study inquires into the nature of the diplomatic process in a federal as distinct from a unitary state, with special reference to their comparative dependability and efficiency. To what extent are the constituent members of a federal state factors in diplomacy? Do they appreciably limit or embarrass the federal machinery? In other words, is a federal state fully sovereign in this important respect, and can other nations implicitly rely upon its contracts?

In ten chapters of thoughtful research and analysis, Dr. Stoke examines numerous federative states, with chief emphasis naturally upon our own, and arrives at general conclusions favorable to their reliability, providing that the unitary states with which they negotiate have a reasonable comprehension of their obvious limitations.

Outside of the United States, the author draws illustrations among others from Canada, Mexico, the nations of South America, the members of the Australian Commonwealth, modern post-war Germany, and Switzerland (of course the classical example.) He provides illuminating interpretation and analysis of this striking aspect of numerous modern states. Sometimes the constituent members embarrass the federal government, as in the Mafia case at New Orleans in 1891. Sometimes the federal government pays exaggerated homage to the constituent members, as in the Webster-Ashburton negotiations of 1842, involving Maine and Massachusetts,—negotiations, it may be added, that Great Britain refused to prosecute until assured that the two states in question would be bound by the result.

The topic obviously calls for wide research and a wealth of illustration, a requirement which the author has successfully met. The work is rich in content and is agreeably presented, some of the author's own reflections indicating marked interpretative power. His general conclusion is that "the insurmountable legal difficulties of the federal state in assuming and discharging international duties are few and comparatively unimportant in nature. The real obstacle in the conduct of foreign relations seems to be a tenacious localism, which sometimes has its roots grounded in racial prejudice, State patriotism, or selfish provincialism, and which does not respond to the urgings of international fairness and consistency. If this spirit could be banished by a greater 'international-mindedness,' the legal differences between federal and unitary states in the management of the international relations would be of little significance."

The study is enriched by a comprehensive bibliography. The index is by no means so complete, but the work is not unduly long and should be read in its entirety.

LOUIS MARTIN SEARS.

Purdue University.

American Church Law. By Carl Zollmann. 1933. St. Paul: West Publishing Co., pp. xv+675. It should be a matter for gratification to the whole American bar that a professor of law can turn aside deliberately

from such popular fields of study and writing as evidence, contracts or corporation law, to investigate some of the remoter fields of legal development. Professor Zollmann's earlier work on *American Law of Charities* was a useful example of this exploration of backlying legal territory. His latest work on *American Church Law* constitutes another source of gratification and creates a sense of obligation to him. It is the outgrowth of an earlier doctoral dissertation on *American Civil Church Law* published in the Columbia University "Studies in History, Economics and Public Law." In its present form it offers not only a compendium in many fields of ecclesiastical law, including religious liberty, religious education, tax exemption, liability, cemeteries, powers of corporations, and clergymen, but it also serves as a scholarly and valuable contribution to some of the highly picturesque but less well known aspects of American history. The several topics are introduced by compact historical notes. These notes in themselves would justify the publication of such a volume. But the analysis and summary of cases with appropriate commentaries provide a body of historical legal material which makes fascinating reading for both the layman and the professional lawyer. Each topic is thoroughly documented with a citation of cases. A careful table of the cases cited, together with a good index, adds to the usability of the text. It should serve a very useful purpose for teaching and reference in theological schools and in other institutions preparing men for professional service in the ministry; indeed it is being used for just these purposes already. But, in addition to that, it is not, perhaps, too much to hope that this work may find circulation amongst the general reading public who desire to acquaint themselves with some interesting by-paths through the socio-legal history of our country.

ARTHUR J. TODD.
Northwestern University

New York Annotated Real Property Forms, by Milton M. Bergerman and Morton Roth. 1931. New York: Matthew Bender & Company. Pp. xxx, 1624.

This book has been examined primarily from the viewpoint of its availability for use in states other than New York where the New York property and procedural statutes have been copied. In a so-called common law state it is obvious that a book of this character would be of but little interest.

The book is divided into two almost equal parts. The first half is devoted to forms of instruments dealing with real property interests; the second half is devoted to procedural forms. The former, to be specific, covers mortgages, leases, contracts of sale, covenants for easements, building contracts, devises and testamentary trusts. The latter includes forms for ejectment, quieting title, reformation and cancellation, foreclosure of mortgages and other liens, partition, action for dower, specific performance, actions between landlord and tenant, injunctions, tax proceedings, actions to set aside fraudulent conveyances, condemnation, waste and the judicial sale of property interests.

The procedural portion of the book is not particularly valuable in the so-called code States. The recent changes in New York procedure have been so numerous and far-reaching that the modern New York code of procedure has little in common with the older code, which remains substantially unchanged in most states which adopted it. At least it is true that this portion of the book would not be easily usable in other states and that a lawyer there would prefer his own local form book.

Few states, however, have an adequate form book on real property law and it would seem that the book would be a desirable tool in those states where the New York statutes and theories have been extensively copied. The work gives evidence of thorough and wise scholarship. The forms fit almost all possible needs. It is there that a competent book of this character is most valuable, for it suggests the possible difficulties and a solution of them. It is an easy task to provide for the usual contingencies, but it takes a lively imagination and a vast experience to provide for the unusual. The authors demonstrate that through experience or imagination they have anticipated most of the possibilities in this field. This feature is augmented by memoranda of points to be considered in closing a real estate transaction, as for example a mortgage loan, or the execution of a long term lease. One whose whole interest is not in the property law field and who therefore has not worked out his own technic in a transaction of that character should welcome this feature as a most valuable one.

The chapters on mortgages, leases and contracts of sale are particularly extensive and complete. The chapter on devises and testamentary trusts, however, does not measure up to the standard set by those previous chapters. The forms there given deal with the usual situations, but no attempt has been made to demonstrate how any devise or trust must and can be made to conform to the New York statutes on restraints against alienation, and against remote vesting. On this score, too, future interests and trusts created by a transfer *inter vivos* are completely neglected. The omissions may not be so serious to the New York lawyer, for there undoubtedly are available competent books covering those situations, as for example, Chaplin's Suspension of The Power of Alienation and Postponement of Vesting (with forms) (3rd ed., 1928). To lawyers in other states struggling with a law of future interests copied from the New York statutes the omission would appear to be regrettable.

BERNARD C. GAVIT.
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Leading Articles in Current Legal Periodicals

Oregon Law Review, June (Eugene, Oregon)—The Restatement of the Law of Contracts with Oregon Notes (Sections 133-147, Chapter 6), by Charles G. Howard; A Survey of All Laws at Present Affecting Intoxicating Liquors in Oregon and a Consideration of the Proper Enforcing Agents for Such Laws, by Karl Huston.

Columbia Law Review, June (New York City)—Review of Law and Facts in the New York Court of Appeals, by Henry Cohen; Federal Farm Legislation: A Factual Appraisal, by Paul J. Kern.

North Carolina Law Review, June (Chapel Hill, N. C.)—A Survey of Statutory Changes in North Carolina for 1933; A New Intestate Succession Statute for North Carolina, by Frederick B. McCall and Allen Langston.

Mississippi Law Journal, May (University, Miss.)—Instructions to Juries—Their Role in the Judicial Process, by R. J. Farley; Modern Tendencies in Preparation for the Bar, by Will Shafroth.

United States Law Review, July (New York City)—The Selection of Judges (Part II), by Henry W. Taft; Regula-

tion of Interstate Motor Carriers in 1931-1932 (Part II), by John J. George.

United States Law Review, September (New York City)—Does the Power to Tax Involve the Right to Destroy a Lawful Business? (Part I) by Abraham J. Levin; Criminal Procedure in Canada, by Justice William Renwick Riddell.

United States Law Review, October (New York City)—Does the Power to Tax Involve the Right to Destroy a Lawful Business? (Part II) by Abraham J. Levin.

American Journal of International Law, July (Washington, D. C.)—The Arbitration of the Guatemalan-Honduran Boundary Dispute, by F. C. Fisher; Japan's Mandate in the Pacific, by E. T. Williams; The Permanent Court of Arbitration, by Manley O. Hudson; Some Observations on the Calvo Clause, by A. H. Feller; Political Arbitration under the General Act for the Pacific Settlement of International Disputes, by Miroslas Gonsiorowski.

West Virginia Law Quarterly, June (Morgantown, W. Va.)—The Menace of Jarndyce and Jarndyce, by J. H. Brennan; Constitutional Limitations on Legislative Procedure in West Virginia, by Frank E. Horack, Jr.; Bulk Sales Laws; Transactions Covered by These Statutes, by Thomas Clifford Billig; Kingsley Richard Smith.

St. Louis Law Review, June (St. Louis, Mo.)—Restatement of the Law of Contracts with Missouri Annotations, by Tyrrell Williams; Liability of an Employer for the Negligence of an Independent Contractor in Missouri, by Glenn Avann McCleary.

Virginia Law Review, June (University, Va.)—Taxation of Donative Transfers Effective at Death, by James F. Ryan; A Study in Comparative Trade Morals and Control, by Frank I. Schechter.

Law Quarterly Review, July (The Carswell Co., Toronto, Ont.)—The Nationality of Corporations, by R. E. L. Vaughan Williams and Matthew Chrussachi; The Ostensible Powers of Directors, by Arthur Stiebel; Trespass and Negligence, by Prof. P. H. Winfield and the Editor; Animus in Roman Law, by Prof. Fritz Pringsheim; A Conveyance of "Mines and Minerals," by Walter Strachan; "Administrative" Tribunals and the Courts, by D. M. Gordon.

Canadian Bar Review, September (Toronto, Ont.)—The Permanent Court of International Justice, by N. W. Rowell; Provincial Taxation as Based on Judicial Incomes, by George E. Taylor; Constitutional Aspect of Insurance Legislation, by Angus C. Heighington; The Eighteenth Annual Meeting of the Canadian Bar Association.

California Law Review, September (Berkeley, Cal.)—Recent Changes in the Bank and Corporation Franchise Tax Act, by Roger J. Traynor and Frank M. Keesling; Claims for Unaccrued Rent in Bankruptcy, by Max Radin.

Air Law Review, July (New York City)—Aircraft Motor Fuel Tax, by William M. Allen; Liability of a Flying School for Damage Done by a Student-Pilot, by Franklin F. Russell; Compulsory Aviation Insurance, by Robert Homburg; Memorandum on Improved Facilities for Airports and Airport Operators in England, by Lawrence A. Wingfield.

Mississippi Law Journal, August (University Miss.)—The Presidential Canvass of 1860 in Mississippi, by Percy Lee Rainwater; Constitutionality of the Emergency Relief Measures, by Orville F. Rush; Municipal Powers Relating to Property, Public Places and Works, by Kenneth P. Vinsel.

The Journal of Criminal Law and Criminology, Including the American Journal of Police Science, July-August (Chicago)—Defective Delinquents, by Louis N. Robinson; Human Sterilization, by J. H. Landman; Vagrancy, by Olof Kinberg; County Jails, by Nina Kinsella; White Slave Traffic, by John Edgar Hoover; Padlocks and Hasps, by A. H. Gill and H. E. Searles; The Third Degree, by Herman C. Beyle and Spencer D. Parratt; Identification of Cloth Ash, by J. D. Laudermilk.

University of Pennsylvania Law Review, November, (Philadelphia, Pa.)—Ownership of Goods shipped under a Bill of Lading to the Seller's Order, by Samuel Williston; "Charities for Definite Persons," by Ralph H. Dwan; Glanvill on the Common Law: *Lex Terrae* and *Ius Regni*, by Max Radin.

New York University Law Quarterly Review, September (New York City)—The Spanish Constitution of 1931, by Mirkine-Guetzevitch; Conditional Limitations in Leases in New York, by Russell Denison Niles; *Stare Decisis*, State Constitutions, and Impairing the Obligations of Contracts by Judicial Decision, by Louis B. Boudin; The Tangle of Contributory Infringement in the Supreme Court, by Willis B. Rice.

Canadian Bar Review, October (Toronto)—The Common Law Judge and Lawyer, by Lyman P. Duff; Roman Law in Canadian Law Schools, by F. C. Auld; Trial Judges and Criminal Negligence, by W. E. Raney.

California Law Review, July (Berkeley, Cal.)—The Restatement of the Law of Contracts, by George W. Goble; Multiplicity of Remedies in the Field of Industrial Accident Law, by Bertram Edises; The Admissibility of Spontaneous Declarations, by Robert L. McWilliams.

Dickinson Law Review, October (Carlisle, Pa.)—Proposed Amendments to the Pennsylvania State Constitution, by A. J. White Hutton; Limitations Upon Accumulation of Income in Pennsylvania for Non-Charitable Purposes, by George Hay Kain, Jr.

Journal of Criminal Law and Criminology Including the American Journal of Police Science, September-October (Chicago, Ill.)—The Gunman, by Andrew A. Bruce and Shurl Rosmarin; Vagrancy, by Olof Kinberg; Institutional Routine, by James L. McCartney; Peddling of Narcotic Drugs, by Harry J. Anslinger; National Bank Offenses, by John Edgar Hoover; Exchange of Finger Prints, by John Edgar Hoover; Police Record System, by Donald C. Stone.

Mr. Carson as a Poet

The following very graceful verses cast an interesting light on the varied talents of the late Hampton L. Carson, former president of the American Bar Association. They were sent to Mr. Howard Benton Lewis, of Philadelphia, in reply to some verses which Mr. Benton had sent him. We are indebted to Mr. Benton for a copy of them.

My gifted friend: I've read your lines
On Christmas time. With joyous pride,
Mark you don't scorn the lowly shrines
Where Muses in their grace abide.

Your mind, most truly, is not dried
Like sawdust from the teeth of law,
But you have wandered by the side
Of pools which Hale and Mansfield saw,

Reflecting all the charms of life,
Amid the tumults of the Courts,
And mingled, in forensic strife,
The darkest pages of Reports

With thoughts that gleam of worlds unknown
To dullards, blinder than the asp,
Who dream not of the secrets shown
To him whose hands the Muses clasp.

Poor fools! whose fancies never stray
To where Parnassus, crowned with flowers,
Beguiles the heaviest hours of day,
And welcomes to her shady bowers

The Lawyer who can frame a song
In praise of kindness, mirth and joy,
And sadness turn, however strong,
To happiness without alloy.

The sky is arched, the rose is red,
And sunshine still is in the air,
Although the plaintiff's hopes are dead,
And non-suits fill the fetid air.

All judgments at the client's cost,
Bills of exception and appeals,
All worries o'er a cause that's lost,
Can never clog his chariot's wheels.

All vanish, when the Muses sing:
"Come cool the brow and slake the thirst,
In Helicon's untroubled spring;
Fly each sad thought, and joy be first."

—HAMPTON L. CARSON,
Dec., 11/13.

Washington Letter

1266 National Press Bldg.,
Washington, D. C., Nov. 10, 1933.

Federal Securities Act

ON November 1 the Federal Trade Commission announced the repeal of the rule promulgated July 27, regarding exemptions from registration under the Securities Act of certain classes of real estate mortgages. In its place, it announced a new rule applicable not only to small issues consisting of notes and bonds directly secured by first mortgage on real estate, but also to any issue the aggregate offering price of which is under $100,000, providing that the issue falls within certain prescribed conditions.

The issues exempted by the new rule can be described as follows:

1. Notes and bonds comprising an issue the aggregate amount of which does not exceed $15,000 which are directly secured by first mortgage or first deed of trust on a piece of real estate used as the issuer's home.

2. Securities (other than securities representing a fractional undivided interest in oil, gas, or mining rights) comprising an issue the aggregate amount of which does not exceed $100,000, subject to the following prescribed conditions:

(a) That the issue shall not be sold otherwise than for cash;

(b) That no other securities shall have been issued by the same issuer in excess of $100,000, including the issue now to be offered, within the year immediately preceding the issue;

(c) That no other securities of the same class shall have been issued within the year immediately preceding for any other consideration than cash;

(d) That the commissions charged in connection with the distribution of the issue shall not exceed 10 per cent of the offering price;

(e) That the issue, if bonds, shall not be divided into units less than $500, and if stocks, into units less than $100, and if any other type of security, into units less than $500;

(f) That if the issue consists of notes or bonds secured by first mortgage on real estate, the issue will also be exempt even if divided into smaller units than $500, provided that a prospectus containing detailed information be furnished to the purchaser.

3. The third class of securities exempt by this regulation comprises issues which are exchanged for other outstanding securities, including in such terms extensions or renewals of outstanding obligations. These issues are exempted when the par value of the securities to be exchanged does not exceed $100,000. A prospectus containing a brief summary of the terms upon which the exchange is to be effected is to be furnished to each person with whom securities are sought to be exchanged for a new security.

On November 6 the Federal Trade Commission made public a letter written in answer to inquiries concerning how far an underwriter may go in discussing and advertising a proposed new offering of securities prior to the effective date of a registration statement filed under the Securities Act. During the time between the filing and the effective date of a registration statement, Section 5 of the Act makes it unlawful for the issuers, underwriters and dealers to make an offer to buy or to sell a security. The word "sell" carries within it the conception expressed in Section 2 (3) of an offer to sell or a solicitation to buy. The same section also makes it unlawful to transmit any prospectus (the central feature of which under Section 2 (10) is the fact that it offers a security for sale) relating to a security during this period prior to the effective date of a registration statement. Dealers are not to be solicited to buy the security until a registration statement is in effect; nor are they to offer to buy such security.

The letter points out that the registration statement is open to public inspection during the waiting period and copies can be obtained at a reasonable price upon request. Portions of the registration statement may also be furnished on similar terms. "Surely, it would be odd, if what the Commission is under a duty to do, the issuer himself would be prevented from doing. In other words, the purpose of promoting general knowledge of the facts required to be stated in the registration statement is clearly set forth in the Act, and nothing in the Act restricts circulation of that knowledge to the Commission alone."

"While no offers to sell shall be made until the expiration of the waiting period, the act contemplates the circulation of knowledge concerning the matters called for in the registration statement as a preliminary to the formation of an intelligent opinion as to the desirability of a particular security prior to the arrival of the time when it permits that now ripened opinion to express itself in an offer to purchase the security. Offers to sell or buy conditioned upon the occurrence of the effective date cannot be made under the act.

"Prospective purchasers, whether they be dealers or the general public, should during this waiting period be educated up to the nature of an issue, which it is expected that they will shortly be asked to buy, always reminding them that no determination to buy is requested of them until the expiration of the waiting period."

The letter called attention to the following excerpt from the House Report on the Act:

"The bill, apart from section 16 (b), is not concerned with communications which merely describe a security. It is, therefore, possible for underwriters who wish to inform a selling group or dealers generally of the nature of a security that will be offered for sale after the effective date of the registration statement, to circulate among them full information respecting such a security. This could easily and effectively be done by circulating the offering circular itself, if clearly marked in such a manner as to indicate that no offers to buy should be sent or would be accepted until the effective date of the registration statement."

Committee on Amendments to the Federal Securities Act

The special Committee of the American Bar Association on Amendments to the Federal Securities Act met in Washington, D. C., on November 2, 3 and 4, and discussed at length the Federal

Securities Act and the regulations of the Federal Trade Commission with respect thereto. The members of the Committee exchanged views with respect to the difficulties encountered in complying with the Act; the liabilities thereunder, both civil and criminal; and what, if any, amendments should be suggested.

After full and complete discussion, a sub-committee was appointed to consider and report a draft of suggested amendments to the Act to the full committee.

Payment of Gold by Treasury on Gold Certificates

Suit has been instituted in the Supreme Court of the District of Columbia, by Halsey K. Davis, of New York City, against the Secretary of the Treasury, and as a result a rule to show cause issued against the Secretary, requiring him to show cause why he should not be required to redeem in gold a $20 gold certificate.

The contention was made that complainant, on October 25th, presented the certificate at the Treasury Department and demanded gold. He was informed that President Roosevelt had forbidden such payment. Complainant contended that this refusal was unconstitutional and asked the court to issue a writ of mandamus compelling the Secretary of the Treasury to give him gold.

The petition recited that the complainant was informed the banking act of March 9, 1933, formed the basis for non-compliance with the terms on the face of his gold certificate.

The Bar and the Recovery Program

On October 10th, Mr. Donald R. Richberg, General Counsel of the N. R. A., delivered an address at the Banquet of the National Association of Insurance Agents. Speaking with respect to the cooperation of the Bar in the recovery program, he said:

"The response of the legal profession to this recovery effort has been most inspiring. The toast of the American bar today is quite properly: 'NIRA —My Code to thee!' It is also significant that the bar as a whole has exercised unprecedented restraint in attacking the law. The killing of a goose which lays golden eggs has little appeal to those who believe in the gold standard."

Status of Low Bidder for Public Work Under NRA

On November 8th, the Comptroller General of the United States promulgated a decision (A-47742) respecting the status of a low bidder whose bid was objected to because he had not signed the President's Reemployment Agreement nor any Construction Code in accordance with the requirements of Bulletin 51, issued by the Administrator, Federal Emergency Administration of Public Works, entitled "Information Relating to the Negotiation and Administration of Contracts for Federal Projects Under Title II of the National Industrial Recovery Act."

The public building project involved—superstructure of the United States Post Office Annex, New York, N. Y.—while originally provided for otherwise is now to be accomplished with moneys allotted by the Administrator of Public Works.

Sec. 53 of Bulletin 51 provides:

"NRA requirements.—(a) No bids will be accepted from any contractor who has not signed and complied with the applicable approved code of fair competition adopted under title I of the National Industrial Recovery Act for the trade or industry or subdivision thereof concerned, or, if there be no such approved code of fair competition, who has not signed and complied with the provisions of the President's Reemployment Agreement."

George F. Driscoll Company, the low bidder, had duly signed the President's Reemployment Agreement and as filed the agreement showed execution on September 29. It appeared, however, that such agreement was not received in the New York City office, United States Department of Commerce, for filing, until October 5, 1933, and the envelope in which received was postmarked 8:30 P. M., October 4, 1933, Grand Central Annex, New York. The bids had been opened October 2.

According to the Comptroller's decision "In failing to have its signed agreement in the local office of the Department of Commerce prior to the opening of bids on October 2, 1933, the low bidder violated no covenant with the President, but due to the fact it might and may have been transmitted for filing after the bids were opened disclosing the Company as low bidder, and might not otherwise have been filed, it is suggested that section 53 of Bulletin No. 51, Federal Emergency Administration of Public Works hereinbefore quoted, may require rejection."

The Comptroller found it unnecessary to determine whether the provisions of section 53 of Bulletin 51, "so go beyond and supplement the law as to be without force or effect under the rule stated in numerous cases including United States v. 200 Barrels of Whiskey, 95 U. S. 571; United States v. Eaton, 144 U. S. 677. The evident purpose of the provision is to encourage support for the President's reemployment program and faithful observance of codes of fair competition by those subject thereto. Efforts prompted by so worthy a motive are not to be discouraged.

A report of a Government inspector under date of October 11, showed that the low bidder "is paying above the NRA wage scale and is conforming to the hours thereof." The Comptroller found, therefore, that "it appears not only that the low bidder had signed the President's agreement before bidding but that such bidder is complying with the covenants thereof.

"When there is considered the purpose and intent of the National Industrial Recovery Act, the serious condition sought by it to be remedied, and the President's prompt action thereunder with a single purpose to secure, through patriotic cooperation with his program by employers, increased wages and employment for those out of work, it would appear out of line with the recovery program and far afield from the high plane on which the President appealed to employers for support of his plan to deny for other than an impelling reason a low bidder for public work who has in the vital things fully cooperated with the President's plan. No such reason appears in the instant case.

"In the light of the facts appearing and the applicable law it is hereby decided the appropriation here under consideration is not available for payments under a contract for the public work bid upon, with other than the low bidder, the George F. Driscoll Company."

South American Current Practices

IX. BRAZIL

BY GORDON IRELAND

THE United States of Brazil is the only country, of those which underwent revolutions in 1930, which is still proceeding under the extra-constitutional regime then set up. Elections were held throughout the country on May 3rd last for 212 (the number in the last regular Chamber of Deputies) Delegates to the approaching Constitutional Convention, whose number of 252 will be completed shortly by the election of members representing organized groups: employers, 17; employees, 18; liberal professions, 3; public functionaries, 2. It is hoped to have the Convention duly constituted in time to commence its work, in the National Chamber of Deputies Building in Rio de Janeiro, on next Independence Day, Sept. 7th. The opposition won in three or four of the States, in the general election of Delegates, but the government has the rest, and with the group Delegates, whose election it is generally thought to be able to control, will have a comfortable working majority in the Convention when it meets.

The impression of the country seems to be that the new Constitution will probably follow in the main the draft which has been reported, but not yet printed for public circulation, by the appointive Commission which has been working on the subject for more than a year, and will not be as radical nor include as many new and modern social reforms as if it had been presented for adoption within a year or two immediately following the revolution. Women were allowed to vote, for the first time in Brazil, in the recent election of Delegates; but it seems improbable that they will be given the suffrage outright by the new Constitution, which may however make some law on the subject permissive to a future Congress; nor will absolute divorce probably yet replace the separation of person and property which is as far as Brazilian law now goes. The present Federal Constitution of Feb. 24, 1891, as amended, which was adopted when Brazil, in 1889, changed from an Empire to a Republic, is in fact substantially suspended, and the Provisional Government is administering by Decrees, which the Convention, or perhaps the first succeeding Congress, will undoubtedly ratify in legal form.

The Civil Code of Feb. 24, 1891, based on the Code Napoleon, forms the basis of the substantive law for the entire country, with the commercial Code of 1850 in force except as to Corporations, controlled by Decree No. 434 of July 4, 1891; Bills of exchange and promissory notes, by Decree No. 2044 of Dec. 31, 1908 and Insolvencies, by Decree No. 5746 of Dec. 9, 1929. Usury is treated in Brazilian legislation for the first time by Decree No. 22626 of April 7, 1933, which establishes a maximum rate of interest on contracts in general at 12%, city mortgages, 10%, rural mortgages, 8% and agricultural loans and machinery purchases, 6%; and is applicable to all contracts in existence at the date of its promulgation, which has had the effect of terminating absolutely all foreclosure actions, with the necessity of waiting a year for default in the new legal rate of interest, and then starting all over again, through the long and costly procedure, with all time and money expended in actions to date merely wasted. It is far reaching in terms, and is likely to bring a great number of perplexing questions before the courts. The Penal Code adopted by Decree No. 847 of Oct. 11, 1890, is in force except so far as it has been modified by the legislation of the several States, which have broader jurisdiction in this respect than on the civil side: there is no death penalty; juries of seven, of whom a majority may return a verdict, are used for all the more serious crimes; and a Childrens' Court and other modern institutions are in operation, especially under the Minors' Code of Decree No. 17943A of Oct. 12, 1927. There is a system of Federal Courts, of First Instance, Appeals, normally to second instance only, and the Supreme Federal Court, with very limited jurisdiction and a not crowded calendar, but much administrative detail. Judicial appointments are for life; and there is great delay in decisions in first and second instances, without discipline of any sort being attempted against either bench or bar. A parallel system in each of the twenty States leads to a State Superior Court whose decisions are final in substantially all cases. The new Federal Constitution will undoubtedly strengthen the central government as against the former power of the States, in the matter of loans and money contracts outside the State, and may also in the same trend give greater revisionary power to the Federal Courts over State decisions in certain matters affecting outside interests. Procedure in the State Courts is a matter regulated by each State Legislature with Codes of its own, and only local lawyers pretend to know it.

Two rival law schools in Rio were a dozen or so years ago consolidated into one Faculty, which grants the degree of Doctor of Law after five years study, following ten to twelve years of primary and secondary education leading up to the Bachelorate; and such Doctor's degree entitles the holder to practice anywhere in the Republic without further examination, upon registration of his title as lawyer in those districts in which he maintains an office.

This completes the current review of the Continent of South America, except for the tenth Republic, Venezuela, which is necessarily omitted from this series; and the colonies of British, Dutch and French Guiana, whose legislation and jurisprudence, with those of the more or less neighboring insular possessions respectively of the Falklands, Trinidad, Tobago and Grenada (British), and Curacao (Dutch) may be considered under the colonial divisions of each of the mother countries.

Brazil, July, 1933.

LETTERS OF INTEREST TO THE PROFESSION

Upholds Proposal to Extend Bankruptcy Jurisdiction to Municipalities and Other Taxable Subdivisions

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

As a member of the Association, I have been amazed, upon reading and re-reading, at the article in the November issue by Mr. Asa G. Briggs, on "Shall Bankruptcy Jurisdiction Be Extended to Include Municipalities and Other Taxable Subdivisions?"

Inasmuch as the so-called Murphy moratorium bill was killed in the House at the last special session, the proposal discussed is assumed to be that embodied in H. R. 5950, known as the Sumners Bill, which passed the House. The scope of this bill is evidently not clearly understood. It provides, in substance, only for a composition proceeding, initiated by the filing of a petition by a taxing unit, upon consent of 30 per cent of its creditors, to be followed by a composition decree after approval of the refunding plan by two-thirds of its creditors, the confirmation discharging all claims not set up in the composition plan.

The first objection made is that this is not bankruptcy legislation. To the contrary, such composition proceedings are a part of the general bankruptcy law; and whether they be regarded as a part of or as arresting and superseding the bankruptcy proceeding, the jurisdiction of the bankruptcy court in respect to such composition proceeding is undoubted; it is of no consequence by what name the composition proceeding be called; the jurisdiction to confirm the composition and to discharge the debtor arises under the bankruptcy clause of the Constitution.

Second, it is objected that Congress has no power to legislate upon purely local governmental matters within the States, hence that to confer jurisdiction upon a Federal court to entertain a composition petition by a taxing unit is unconstitutional.

Federal courts have, and always have had, jurisdiction to entertain suits by or against the taxing units of a State, where requirements as to amount and citizenship exist. A municipality of a State may sue or be sued in the Federal court; that court may and does issue writs of mandamus at the suit of bondholders, either for payment of money, or to enforce tax levies. Is this unbroken exercise of jurisdiction constitutionally unwarranted? If the Federal court may entertain any litigation, either in law or equity, relating to the financial affairs of a municipality, why may it not also constitutionally be vested with the limited bankruptcy jurisdiction proposed by the Sumners bill?

The bill confers no authority to levy or collect taxes; and expressly prohibits any interference with local governmental powers or functions; and, before a taxing unit can avail itself of the proposed remedy, the State which created it must first authorize such action. The final result is a correct composition approved by the taxing unit and a two-thirds majority of creditors.

This measure is one of momentous consequence in our general recovery program. Over 1,200 taxing units, in 41 States are in default on bonds exceeding $1,100,000,000, and great financial losses to the taxing units and bondholders as well as serious impairment of the standing and marketability of all municipal bonds are the result. Readjustment of debts upon a practical basis, is necessary. No procedure is possible to that end through State legislation; no power exists in a State to bind a minority bondholder, with the consent of a two-thirds majority of his class, or otherwise. The Federal government, having retained sole bankruptcy jurisdiction, owes it to the States to extend to their political subdivisions this common sense remedy for speedy adjustment of their affairs; otherwise, those units face financial chaos for decades to come.

No ground exists for imputing to municipalities, more than to individuals, a desire to take advantage of bankruptcy for profit; the requirement for the consent of a two-thirds majority of creditors, and for the finding of the Judge as to the fairness and feasibility of the refunding plan, precludes the possibility.

Those who suggest the lack of necessity for the remedy are not informed; experience has conclusively demonstrated the utter impossibility of securing unanimous consent of a considerable body of municipal creditors to any adjustment. The bill is aimed solely at the small "hold-out" minority of creditors—the like of which will be found in every general bankruptcy composition—who seek selfish advantage over the rest of their class.

As to the question of policy, that may best be left to the judgment of the municipal bond houses whose business is that of marketing bonds; they have actual knowledge of conditions, and a clear conception of remedial steps required; their national organization, the Investment Bankers Association, has approved the bill. The United States Conference of Mayors, the membership of which embraces about 150 of the largest cities, has approved it. Obstructionists are such because of their insufficient knowledge of the situation, and the abstract and casual character of their views. The measure will rehabilitate the presently impaired credit of solvent municipalities, afford a new starting point for the insolvent ones, restore public confidence in municipal bonds as an investment, and enhance the marketability and value of such bonds.

VINCENT D. WYMAN, Mayor.

Coral Gables, Fla., Nov. 6.

Diversity of Citizenship Jurisdiction and Competing Corporations

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

From time to time I have read articles and comments in the journal concerning proposed legislation to either abolish or restrict that jurisdiction of the Federal Courts based upon diversity of citizenship. In none of the articles which I have read have I ever seen advanced an objection to the present situation which appears to me as being more serious than any other one objection. This is the unfair advantage now offered to a corporation of one state to go into another state and transact business and, in case of litigation, growing out of business in that state, frequently have a choice of different legal rules which choice is denied to competing corporations who are citizens of the state where the transaction occurs.

I would venture no estimate as to the number of rules of law whose application differs in the state and federal courts of the various districts and which may be vital to the practical results of litigation, but I have had my attention called to several such situations. One such condition exists in the case of an action against a corporation for damages resulting from fraudulent representations by said corporation of facts pertaining to the value of property sold. The federal rule as elaborated in the case of Sigafus v. Porter, 179 U. S. 116, is to the effect that the measure of damages is limited to the difference between the contract price and the fair value of the property sold. The rule in Indiana as defined in the case of McFadden v. Robinson, 35 Ind. 24, is that the measure of damages is the difference between the fair value and what the value would have been if the article was as represented. It appears that the majority of the state courts follow the same rule as that followed in Indiana. This is a question governed by the law of the forum and not controlled by the Conformity Act. Thus a defrauded party in most state courts can recover the loss of his bargain while the defrauded party in the federal court can only recover his actual provable monetary loss. In many cases the difference in the application of the two rules is a difference between no recovery and a substantial recovery.

As a result of this situation a corporation organized to conduct a business in Indiana can incorporate in Delaware, although having its sole place of business in Indiana, and when sued in such a case involving more than $3,000 have a choice of courts depending upon which court's rule on measure of damages is most beneficial to said corporation in the particular case, while a like corporation engaged in a like business in Indiana but incorporated in Indiana has no such choice. It appears obvious to me that it is unfair that the foreigner should be entitled to this greater protection of the law than the citizen of the state.

The legislation suggested by Ex-Attorney General Mitchell would go far enough to obviate this situation. The situation could likewise be remedied by leaving the federal court jurisdiction as it is and amending the removal

statutes in such way as to provide that all legal questions in a removed case be determined by virtue of the laws of the state and not by the law of the forum. However, the result is accomplished it would be in the interest of fairness to eliminate such a situation.

While considering this subject, I have also been impressed by the fact that it is unfair to provide that in case a defendant asks for a removal of the suit from the state to the federal court the plaintiff in the case should be required to make cost deposits or furnish cost bonds in the federal court. It impresses me that the party desiring the removal and thus invoking the services of the federal court should be the one to defray that court's expenses until a judgment is arrived at. This is a matter that could be changed without any act of Congress if the rules of the federal courts were changed, but on the other hand, it could be remedied by act of Congress and not left to the willingness of the federal courts to voluntarily make the change, a willingness which they do not seem inclined to exercise.

H. K. BACHELDER.

Indianapolis, Sept. 14.

NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

California

Report of Committee on Practice Before Industrial Accident Commission Rouses Spirited Debate at Sixth Annual Meeting—Problems of Legal Education and Bar Admission Considered — Ways for Carrying Out Recommendations of Law School Survey Adopted, etc.

The State Bar of California held its sixth annual meeting at Del Monte on Sept. 21, 22, 23. There was the largest attendance in its history at the opening meeting. The following details of the proceedings are taken from the October issue of *The State Bar Journal:*

President Crump delivered his annual address, which was a report of his stewardship and a statement of the things achieved by The State Bar during the past six years.

The reports of the Board of Governors, outlining the work of the Board for the year, and of the Treasurer were presented by Secretary-Treasurer James F. Brennan, of San Francisco.

Reference to the Board of Governors for re-reference to either the same or another committee of the report of the Committee on Practice and Procedure before the Industrial Accident Commission, recommending, among other things, that no one but attorneys at law be permitted to practice before the Industrial Accident Commission, and suggesting a schedule of fees to be paid out of compensation awards, was the outstanding action taken at the morning session of the first day.

The report was opposed vigorously on the ground that the first two recommendations carried the implication that their purpose was to give to members of The State Bar a monopoly of the practice before the commission, now permitted to laymen, and to increase the earning power of members of the bar, thus placing an onerous burden upon applicants for and recipients of compensation. It was defended with equal fervor and finally the motion to refer was adopted by a close vote.

The afternoon session was devoted to addresses and reports upon the perennial topic of legal education and admission to the bar. Before taking up the topic scheduled for discussion, reports set for the morning but not reached were disposed of.

The report of the Committee on Bankruptcy Law was presented by L. B. Binford, chairman of the Southern California Section of the Committee. This report, which advocates the adoption of certain rules relating to equity receivership, was unanimously approved by the convention.

H. C. WYCKOFF
President, State Bar of California

John H. Riordan, San Francisco member of the Board of Bar Examiners, delivered an interesting address on "The National Conference of Bar Examiners." Mr. Riordan devoted himself to a discussion of the overcrowding of the bar and the necessity for "the elimination of private and unsupervised study of the law and the substitution therefor of two or more years of college training prior to the commencement of the study of law."

Joseph J. Webb, San Francisco, former President of The State Bar, delivered an address on "The Law School Survey," in which he outlined the findings of the report recently filed by Will Shafroth of the Denver, Colorado, bar and Prof. H. C. Horack of Duke University.

He was followed by Charles A. Beardsley, chairman of the Presidents' Advisory Committee, whose report set up the manner in which the recommendations of the law school survey might be carried out. The recommendations of the committee, which were unanimously adopted by the convention, follow:

1. That the Board of Governors adopt, and recommend to the Supreme Court that it approve, amendments to the Rules Regulating Admission to Practice, so as to provide:

(a) That students be required to register with The State Bar before beginning the study of law, subject to the power of the Committee of Bar Examiners to make such exceptions as may be necessary so that no injustice would be done.

(b) That, beginning in the summer of 1937, The State Bar require all first-year students, subject to like exceptions, to take an examination in first-year law subjects, unless the students take their first-year work in a law school that is approved by the Committee of Bar Examiners.

(c) That whether or not a California law school shall be approved by the Committee of Bar Examiners shall depend upon the showing made by its students in our bar examinations, according to the statistics, the publication of which is now provided for in the Rules; that the test shall be whether at least 60 per cent of such students taking the examination for the first time pass, and that such percentage be based upon the examinations given in 1934, and thereafter, such statistics to be cumulated until they cover three years, and then to be based upon the last preceding three years' records.

(d) That appropriate provision be made for approving out-of-State law schools, either on the basis of the American Bar Association's approved list or otherwise;

(e) That each student taking the first year examination be required to pay such a fee, to be fixed in the Rules, as may be necessary to defray the cost of such examination:

2. That the fixing of a 60 per cent basis for the approval of law schools be not regarded as the adoption of a permanent policy, but that it be the aim of The State Bar to gradually raise this requirement after the law schools have been given a reasonable opportunity to raise their standards;

3. That this report be included in the supplement to *The State Bar Journal* to be mailed to the members of The State Bar, and be presented to and considered by the membership at the next annual meeting.

At the evening session Chester H. Rowell, publicist and journalist, delivered the Alexander F. Morrison Foun-

dation Lecture, taking as his topic "Has the NRA Killed the Constitution?"

Former President Peter J. Crosby of Oakland presided at the Friday morning session. The oath of office was administered to the newly elected members of the Board of Governors by Mr. Chief Justice William H. Waste of the Supreme Court.

An address on "Recent Amendments to the Code of Civil Procedure" was delivered by Prof. William B. Owens of Stanford University Law School, in which the scope and purpose of the changes were explained. Prof. Evan Haynes of the School of Jurisprudence of the University of California delivered an address on "Reform of Appellate Procedure," in which he outlined some of the features of the so-called Hollzer revision of Article 6 of the Constitution. O. K. Cushing of San Francisco presented the report of the Section Committee, which was adopted, and John Perry Wood delivered an address upon the necessity for the adoption of A. C. A. No. 98, providing an optional plan for the election of judges in the county of Los Angeles.

At the Friday afternoon session the report of the Committee on Unlawful Practice was presented by Jesse W. Carter of Redding, chairman of the committee. The report reviewed the activities of the committee during the year and stated that prosecutions of banks and trust companies and title companies were under way. The report was received and filed.

The report of the Committee on Uniform Court Vacations, Hartley F. Peart, San Francisco, chairman, was received and filed, as were the reports of three committees upon various phases of California Annotations to Restatements by the American Law Institute of the Law of Contracts and of Conflict of Laws.

The final session of the sixth annual convention of The State Bar at Del Monte opened with the introduction by President Guy Richards Crump of the officers of The State Bar who had been elected at the organization meeting of the Board of Governors. The officers are: Hubert C. Wyckoff, Watsonville, president; A. G. Bailey, Woodland; Theodore P. Wittschen, Oakland, and John Perry Wood, Los Angeles, vice-president; M. Mitchell Bourquin, San Francisco, treasurer. President Crump stated that the offices of secretary, heretofore held by a member of the board, and executive secretary, had been consolidated, and Dean R. Dickey elected to the post of secretary.

Vice-President Jesse W. Carter of Redding presided at the final session. A. G. Bailey of the Woodland, chairman, presented the report and recommendations of the Committee on Resolutions.

The resolution proposed by H. W. Elliott of Los Angeles, providing for the appointment of a committee with reference to the effect of NIRA on the legal profession was adopted.

A resolution proposed by Rosalind G. Bates of Los Angeles, providing that the Board of Governors appoint a committee to investigate methods of professional and business organizations for the care of indigent members, was adopted after considerable argument.

A resolution proposed by Augustin Donovan of Oakland, providing for the appointment of counsellors to advise recently licensed attorneys concerning placement, location and other matters, was adopted.

The report of the Committee on Legislation, A. G. Bailey of Woodland, chairman, was presented. Considerable opposition developed to the first recommendation of the committee, providing that at the next session of the Legislature The State Bar employ an able and experienced lawyer to be in attendance at Sacramento during the sessions. After some argument the recommendations were separated so that the first recommendation could be voted upon separately. When it came to a vote, however, all of the recommendations were adopted.

Louisiana

President Barksdale Stresses Importance of Work of American Law Institute in Annual Address—Association's Experience with Plan for Nomination of Judicial Candidates Set Forth and Further Trial Urged — Other Matters Considered

The Louisiana State Bar Association held its 36th annual meeting in Shreveport on October 6th and 7th.

The invocation was delivered by Dr. J. M. Owens, Rector, St. Mark's Episcopal Church, Shreveport. Address of welcome on behalf of the City of Shreveport was by Honorable George W. Hardy, Jr., mayor of Shreveport. Address of welcome on behalf of the Shreveport Bar Association by Sidney M. Cook, Esquire, former president of that association. Responses thereto by Charles A. Holcombe, Esquire, Baton Rouge.

The president, Joseph D. Barksdale, Esquire, of Shreveport, in his annual address stated among other things that the annual meeting would devote most of its time to the Restatement of the Law by the American Law Institute, "the greatest work ever undertaken by the legal profession since the days of Tribonian and his immortal commission under Justinian." He dwelt on the activities of the Association during his term of office. The following excerpt is taken from his address:

"During my administration a Democratic President has been elected by an overwhelming majority while we were groping and feeling for the bottom of the most acute and wide-spread depression of all time. Promptly, lustily, he accepted responsibility for improving conditions and immediately asked the Congress for the most extensive emergency powers ever granted a President in peace. These powers were granted him and after seven months he still is laboring with unabated energy and courage on the infinite problems of his great task of uniting our purchasing power, our labor power and our management power under the covenant of the NRA.

"In the field of national legislation and national politics, all I have to say is: Let us support the President. All of us have winced at some of the powers given him by Congress and some of his executive orders, for instance, the striking out of every contract the obligation to pay in gold, the penalizing of people for keeping their gold, the forcing of industry into combines which were but yesterday denounced, and some of the drastic provisions of the National Industrial Recovery Act.

"The Supreme Court will doubtless have to pass on the constitutionality of these emergency and other laws, and they will probably be sustained by divided opinions. In my opinion, the Court must pass on the fact of emergency and necessity that know no law and the effect of emergency and necessity on the supreme law of the land. . .

"But whatever may be ahead of us, whatever may be the future of the Constitution of our fathers, let the legal profession keep its feet on the ground. There never has been a time when there was greater need for the lawyer with the trained and experienced legal mind, with heart in sympathy with the common good. Let us hold in our minds the living words of Alexander Hamilton at the beginning of our constitutional life: 'Justice is the end of Government. It is the end of civil society. It ever has been, ever will be, pursued until it be obtained or until liberty be lost in the

HENRY G. MCCALL
President, Louisiana State Bar Association

pursuit.' Let us as a profession do everything in our power to help the President put into effect and carry out the National Recovery Act, everything we can to sustain his stalwart faith in the American people . . ."

W. W. Young, Esquire, secretary, New Orleans, submitted his report, showing the membership standing and financial condition of the association. Paul B. Habans, Esquire, New Orleans, state manager of the Home Owners' Loan Corporation, explained the workings of the Act of 1933, under which it is operating. Numerous other matters were reported upon through the many

standing and special committees of the Association.

Solomon Weiss, Esquire, New Orleans, gave some very interesting and instructive observations on the New Bankruptcy Amendments. Herbert F. Goodrich, Esquire, Philadelphia, Adviser on Professional Relations to the American Law Institute, was the Association's guest of honor and he delivered an interesting and instructive address on The Restatement of the Law.

Mr. Goodrich was followed by Samuel Welmore Plauché, Esquire, of the Lake Charles Bar, chairman of the Special Committee on the Work of the American Law Institute, who submitted his Committee's report of its activities, which showed much deliberation and thought, and showed progress made in this very important undertaking.

Monte M. Lemann, Esquire, of the New Orleans Bar, recounted the Association's experience in the nomination of Judicial Candidates. He stated that the method for the expression of the opinion of the bar of Louisiana in the filling of Appellate Judicial vacancies was adopted by the Association in April, 1932, by which questionnaires would be distributed to the members of the entire bar, irrespective of membership in the association, and their opinions solicited upon the qualifications of candidates for appellate judicial office, and thereafter a vote would be taken of the members of the bar, confined to lawyers residing in the jurisdiction where the popular vote was to be taken and from which the candidate was to be elected, so that their conclusions, in the light of the answers to questionnaires, might be registered and the popular vote enlightened.

This plan had been used for three elections since its adoption. He regretted that the experience of the Association with regard thereto was not especially encouraging. This regret was based, among other things, on the lack of interest manifested by the lawyers, both members and non-members of the association, in answering the questionnaires and voting. Members of the association showed more interest than the non-members, but not a gratifying difference. He went exhaustively into the method adopted and the actual carrying of same into effect. The three elections referred to were to fill a Supreme Court vacancy and two Court of Appeal vacancies. In the first named, the candidate receiving the most bar primary ballots was defeated by popular vote by the candidate receiving the smaller number of bar primary ballots. In the two other instances the popular vote, Mr. Lemann said he is informed, followed very closely the result of the bar primary. He said that it seems to him "that it would be clearly a mistake for us here to even consider any other method of proceeding in this matter until we have given our present plan a better trial than it has had so far."

Mr. Lemann is also chairman of a special committee on "The Submission of a Plan Whereby State or Local Bar Associations may recommend appointments of Federal Judges and United States District Attorneys in Louisiana" but had no report to make at that time.

The following officers were elected: Henry G. McCall, New Orleans, president; John D. Miller, New Orleans, vice-president, 1st supreme court district; Pike Hall, Jr., Shreveport, vice-president, 2nd district; U. A. Bell, Lake Charles, vice-president 3rd district; Carey J. Ellis, Jr., Rayville, vice-president, 4th district; Charles V. Porter, Baton Rouge, vice-president, 5th district; Robert E. Brumby, Franklin, vice-president, 6th district; W. W. Young, New Orleans, secretary-treasurer.

The entertainment features were many and thoroughly enjoyed. The convention was well attended and considered a very successful one. It closed with a banquet.

W. W. YOUNG, Secretary.

Mississippi

HON. J. H. PRICE
President, Mississippi State Bar Association

Mississippi State Bar Defers Action on Creation of Judicial Council — U. S. Senator Pat Harrison Delivers Address — President Truly Makes Important Recommendations — Judge Price Chosen to Head Organization

The twenty-eighth annual meeting of the Mississippi State Bar was held at Vicksburg on Sept. 7 and 8. It was a very interesting meeting, characterized by able addresses and serious discussion. The proposal to urge legislation creating a Judicial Council, presented by a committee of which Judge Vergil Griffith of the Supreme Court was chairman, caused a particularly spirited debate. At its conclusion the question was referred to the incoming Board of State Commissioners with instructions to report at the next meeting of the Association.

President Jeff Truly called the meeting to order and presided at the sessions of the Association. The invocation was delivered by Rev. W. H. Morgan, pastor of the First Baptist Church of Vicksburg. Addresses of welcome were delivered by Hon. J. C. Hamilton, Mayor, on behalf of the city of Vicksburg, and by Hon. R. M. Kelly, President of the Warren County Association, on behalf of the Vicksburg Bar. Hon. M. W. Reily responded for the Mississippi State Bar.

President Truly then delivered the presidential address. He reviewed the genesis and work of the State Bar, urged legislation or, if necessary, constitutional amendment in order to provide a more satisfactory method of dealing with applications for reinstatement and made various suggestions as to ways in which individual members may increase the efficiency and influence of the State Bar. He approved the proposal to combine the Circuit and Chancery courts. He commended the problem of methods of judicial selection to the earnest consideration of the members. President Truly devoted much of his address to suggestions for the benefit of the younger members of the Bar.

U. S. Senator Pat Harrison then made an address setting forth what the Administration has done to promote national recovery. It was a very clear and forceful presentation of the conditions which led up to the legislation and of the large outlines of the legislation itself.

At the morning session Friday Hon. A. T. Stovall, of Columbus, made a brief and interesting statement about the meeting of the American Bar Association at Grand Rapids. Chief Justice Sydney Smith then told of the work of the American Law Institute and stressed the importance of State Annotations. He thought the State Bar should take the initiative in getting the Restatement of "Agency" annotated in Mississippi. At the conclusion of his remarks, a motion was made and carried to instruct the Board of Commissioners that this work should be done at the expense of the State Bar.

Judge T. C. Kimbrough, Dean of the Law School of the University of Mississippi, then made a brief address, giving something of the methods and aims of that department of the State University.

On motion of Mr. Boyett a resolution was passed to send a telegram to President Roosevelt declaring that the State Bar is in full accord with the National Recovery Act and pledging 100 per cent cooperation.

Judge W. W. Venable next delivered an address on "The Progress of the Mississippi State Bar," after which officers were elected for the ensuing term. Hon. J. H. Price of Magnolia and Col. W. Calvin Wells of Jackson were nominated for President in eloquent speeches. Judge Price was elected, and his selection was made unanimous, on motion seconded by Col. Wells. The newly elected President thanked the Bar for the honor. At no time, he said, had the duties and opportunities of the Bar for public service been greater.

South Dakota

South Dakota Bar Association Creates Judicial Council as Section of Organization — Members of New Body Chosen—Reports

Creation of a Judicial Council as a section of the State Bar was perhaps the outstanding action taken at the third annual meeting of the State Bar of South Dakota, held at Aberdeen on August 24 and 25.

The report which was the basis of this step was presented by Judge Van Buren Perry, who had been appointed as a committee of one to consider the

CHAMBERS KELLAR
President, South Dakota Bar Association

subject. It gave something of the origin, developments and accomplishments of the movement to date, and ended by outlining a plan for the creation of such a body as a permanent section of the State Bar. "It is to be noted," the report says, "that the proposed Judicial Council in South Dakota is to be created by action of the State Bar and must be financed by the State Bar. This has been done in Idaho and Utah. Legislative sanction and appropriation would be most desirable but it seems inexpedient to ask for the appropriation until the Judicial Council has demonstrated such worth that the difficulty of procuring the appropriation will be minimized."

The Judicial Council, as created, is to be composed of three actively practicing members of the bar, two Supreme Court Judges, two Circuit Court Judges, one County Judge, the Attorney General and the Dean of the College of Law—the last two members to be ex-officio. The representatives of the Supreme Court are to be selected by the members of that court and the Association of Circuit Judges and the County Judges' Association will respectively name the representatives of those courts. The State Bar will elect its members at annual meetings. The purposes of the Judicial Council are in general those of similar bodies in other States.

In accordance with the provisions in the report as adopted, the State Bar elected Lewis W. Bicknell of Webster, D. K. Loucks of Watertown and George Williams of Rapid City to the Council. The Supreme Court designated Justices Dwight Campbell and S. C. Polley to serve, and the County Judges' Association named Hon. Judson L. Whicher of Highmore. The Association of Circuit Judges had not acted when this report was written.

The Committee on Legal Reform, of which W. W. French is chairman, presented a report recommending that the Legislature pass an act providing that the Supreme Court shall, as soon as it conveniently can after July 1, 1935, by rules established by it, "define the practice of law and who may be admitted to practice, and regulate the conduct of any person so admitted; and the Court may from time to time amend such rules and establish such further rules

as it may deem necessary." The rules in question are to have the force of statute law. The committee made other recommendations, among them one for survival of tort actions after death of either the injured party or the party causing the injury.

The report of the Committee on Legal Education, of which Mr. Marshall McKusick is chairman, gave a number of facts showing that in a number of states "there is a decided tendency in the direction of more stringent requirements not only for admission to the bar but incidentally in the field of legal education and in no sense are there any indications of making present requirements less severe." The report expressed the view that there was no reason at this time for the passage of legislation denying the diploma privilege to graduates of the State University—the only law school in the State.

Mr. W. F. Bruell, chairman of the Committee on Uniform State Laws, submitted a report showing what had been accomplished during the past year along the line of uniformity. The Uniform Mechanics Lien Act had not been presented to the Legislature the past year because the committee considered that there were more important matters requiring legislative attention and that the act was not one requiring immediate action in South Dakota. The uniform act to secure the attendance of witness from outside the State was adopted by the legislature last winter as were the Uniform Machine Gun Act and the Uniform Criminal Extradition Act.

The address of welcome was delivered by Mr. W. F. Mason, President of the Brown County Bar Association, and the response was made by Mr. Chambers Kellar, of Lead, Vice-President of the State Bar. The principal addresses of the two sessions were delivered by Hon. W. W. Knight, President of the State Bar; Hon. Philip F. LaFollette, Ex-Governor of Wisconsin, who spoke on "Where Are We Going?" and Hon. Arthur F. Mullen, Washington, D. C., on "The Father of the Constitution." At the annual dinner Ex-Governor La Follette, Hon. Arthur F. Mullen, and Hon. Harvey T. Harrison of Little Rock, Ark., made short talks.

The following officers were chosen: President, Chambers Kellar, Lead; Vice-President, George J. Danforth, Sioux Falls; Secretary, Karl Goldsmith, Pierre; Treasurer, R. M. Simons, Belle Fourche. Board of Bar Commissioners: First circuit, F. D. Wicks, Scotland; second, Alan Bogue, Parker; third, John H. Hanten, Watertown; fourth, C. L. Morgan, Mitchell; fifth, J. J. Fitzpatrick, Aberdeen; sixth, D. J. O'Keefe, Pierre; seventh, Harold R. Hanley, Rapid City; eighth, Chambers Kellar, Lead; ninth, Roy T. Bull, Redfield; tenth, J. H. Bottom, Faulkton; eleventh, Charles A. Davis, Burke; twelfth, Thomas R. Nelson, Dupree. At-large: Harry P. Atwater, Sturgis; G. J. Danforth, Sioux Falls, and Ralph A. Dunham, Clark.

FRED E. GLEASON
President, Vermont Bar Association

Deaths of Members Reported

The Secretary's office has been advised of the death of the following members:

George V. A. McCloskey, of New York City, on March 29th.

Judge John H. Cotteral, of Guthrie, Okla., on April 22nd. Judge Cotteral had been a member since 1914.

Clinton A. Groman, of Allentown, Pa., a member since 1917, on March 30th.

Julius C. Gilbertson, of Eau Claire, Wis., a member for the past eight years, on February 24th.

Anthony Hall, of Paris, Ark., on April 10th. Mr. Hall joined the Association in 1925.

Frank L. Belknap, of Chicago, a member of the Association since 1925, on May 10th.

George B. Pugh, a member of the firm of Buzbee, Pugh and Harrison, of Little Rock, Ark. Mr. Pugh had been a member of the Association for twenty years.

Frank O. Johnson, of McPherson, Kansas, a member since 1912, on April 22nd.

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